86-899

No. 86-_____

Supreme Court, U.S.
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In the Supreme Court of the United States
October Term, 1986

MORRIS THIGPEN, ET AL.,
PETITIONERS

VERSUS

LARRY JONES
RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

EDWIN LLOYD PITTMAN
ATTORNEY GENERAL
STATE OF MISSISSIPPI

MARVIN L. WHITE, JR.
ASSISTANT ATTORNEY GENERAL
(COUNSEL OF RECORD)

AMY D. WHITTEN
SPECIAL ASSISTANT ATTORNEY GENERAL

POST OFFICE BOX 220
JACKSON, MISSISSIPPI 39205
TELEPHONE: (601) 359-3680

211pp

QUESTIONS PRESENTED

1. Certiorari should be granted where the Court of Appeals and the District Court erred in not holding that Respondent's claim of ineffective assistance of counsel was procedurally in violation of Wainwright v. Sykes and Engle v. Isaac.

2. Certiorari should be granted where the Court of Appeals and the District Court erred in concluding that petitioner was denied effective assistance of counsel at the sentencing phase of his trial by a misapplication of the standard set forth in Strickland v. Washington.

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NO. 86- _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

MORRIS THIGPEN, ET AL.,

Petitioners,

vs.

LARRY JONES,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Petitioner, State of Mississippi, respectfully prays that the Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit be granted in this case.

OPINIONS BELOW

The opinions of the Court of Appeals that are the basis of this petition are reported as Jones v. Thigpen, 788 F.2d 1101 (5th Cir. 1986) and the opinion denying panel rehearing and suggestion of rehearing en banc as Jones v. Thigpen, 795 F.2d 521 (5th Cir. 1986). A copy of the opinions are attached hereto in Petitioner's Appendix at A1-A12.

Other opinions below pertinent to the determination of this case are:

State Court: Respondent's original conviction and sentence of death were reversed pursuant to Jackson v. State, 337 So.2d 1242 (Miss. 1976), in a unpublished opinion reported as Jones v. State, 342 so.2d 735 (Miss. 1976). The opinion of the Mississippi Supreme Court upholding the conviction and sentence on remand is reported as Jones v. State, 381 So.2d 983 (Mis. 1980). A-108. Jones' application for leave to file a petition for writ of error

coram nobis was denied without opinion and the order denying the same was not reported.

United States Supreme Court: This court's denial of respondent's petition for writ of certiorari subsequent to his Direct Appeal is reported as Jones v. Mississippi, 449 U.S. 1003, 101 S.Ct. 543, 66 L.Ed.2d 300 (1980).

District Court: The United States opinion denying relief as to the guilt phase and granting relief as to the sentence phase is reported as Jones v. Thigpen, 555 F.Supp. 870 (S.D. Miss. 1983). A-74.

Court of Appeals: The panel decision of the Court of Appeals is reported as Jones v. Thigpen, 741 F.2d 805 (5th Cir. 1984). A-15. The per curiam orders denying panel rehearing and suggestion of rehearing en banc are reported as Jones v. Thigpen, 747 F.2d 1465 (5th Cir. 1984). A-14.

United States Supreme Court: This court's opinion granting the State's petition for writ of certiorari vacating the judgment of the Court of Appeals and remanding this case for reconsideration in light of Cabana v. Bullock, ___ U.S. ____, 106 S.Ct. 689, 88 L.Ed.2d 704 (1986), is reported as Thigpen v. Jones, ____ U.S. _____, 106 S.Ct. 1172, 89 L.Ed.2d 292 (1986). A-13.

JURISDICTION

Petitioner invokes the jurisdiction of this Court by way of a Petition for Writ of Certiorari through the authority of 28 U.S.C. § 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOKED

Petitioner seeks to invoke the provisions of the Constitution of the United States, Amendments VI, VIII, and XIV. Petitioner also relies on Section 28 U.S.C. § 2254(a), viz.,

> ". . . a district court shall entertain an application

> for a writ of habeas corpus in behalf of a person in custody pursuant to a judgment of the State Court only on the ground that he is in custody in violation of the Constitution or laws . . . of the United States".

STATEMENT OF THE CASE

A. Substantive Facts

The facts of this case are adequately set forth in the opinion of the Mississippi Supreme Court reported as Jones v. State, 381 So.2d 983 (Miss. 1980).

B. Procedural History

Respondent, Willie Reddix and John Durengo Reddix were jointly indicted in the Circuit of the Second Judicial District of Harrison County, Mississippi, on or about February 7, 1975, in cause number 968 for the December 2, 1974 crime of capital murder of Arthur Weinberger.

On March 19, 1975 respondent was found guilty and sentenced to death. A timely appeal

was perfected and the case was reversed with instructions to follow the procedures outlined

On March 3, 1981, respondent filed an application for leave to file a petition for writ of error coram nobis with the Mississippi Supreme Court. [Miss. Code Ann. §99-35-145 (repealed April 17, 1984, Ch. 378, Miss. Gen Laws of 1984)]. On April 1, 1981 the Court dismissed the application without opinion, and respondent filed a petitioner's to answer within ten (10) days petition for writ of habeas corpus in the United States District Court for the Southern District of Mississippi. On June 2, 1981, the petitioners were ordered to show cause, and on June 24, 1981, the issues were joined.

On February 4, 1982, a status conference was conducted before the Honorable Dan M. Russell, Senior United States District Judge, whereupon the respondent was granted twenty

(20) days within which to file an amended petition with thereafter. A briefing schedule was established and a tentative hearing date set.

On February 26, 1982 respondent filed his amended petition and for the first time raised the question of denial of effective assistance of counsel. In their answer and return the petitioners plead that the effective assistance claim as well as others were procedurally barred.

On August 16, 1982, a hearing was held. No testimony was taken on the effective assistance issue, since petitioner was not present. Oral argument was heard on the remaining issues. On October 7, 1982 the hearing was reconviened with Dr. Gilbert S. MacVaugh, Ph.D. being called to testify on behalf of the respondent and Dr. Glenn Anderson, M.D., Dr. Will Johnson,

Ph.D., and Hugh McLaurin, Jr.being called on behalf of the State.

On January 28, 1983 the District Court filed a memorandum opinion denying the writ in part as to the guilt phase and granting it in part as to the sentencing phase on two grounds; [1] that no finding as required by Enmund v. Florida, 458 U.S. 782, 103 S.Ct. 3368, 73 L.Ed.2d 1140 (1982), had been made by the jury and [2] that respondent had been denied effective assistance of counsel during the sentencing phase of his trial. Jones v. Thigpen, 555 F.Supp. 870 (S.D.Miss. 1983).

An appeal was thereafter taken to the Fifth Circuit by the petitioners,and respondent filed a cross-appeal. Several issues were assigned as error including the failure of the District Court to find the ineffective assistance of counsel claim to be procedurally barred. The Court of Appeals for the Fifth Circuit affirmed

the District Court in part, reversed in part, and remanded with instructions. In their opinion the panel found:

> 1. That the proscription of Wainwright v. Sykes, 433 U.S. 72 (1977), was not jurisdictional and that they could address the merits of the lesser included offense claim.
>
> 2. That there was no merit to the lesser included offense claim.
>
> 3. That the District Court was correct in its ruling that there was no talismanic jury finding as required by Enmund.
>
> 4. That the District Court erred in denying the sufficiency of the evidence claim as such related to Enmund.
>
> 5. That because it was affirming the grant of relief as to the sentencing phase, the Court did not have to address the claim of denial of effective assistance of counsel.

See Jones v. Thigpen, 741 F.2d 805 (5th Cir. 1984). The respondent's petition for panel rehearing and suggestion for rehearing en

banc were denied without opinion. Jones v. Thigpen, 747 F.2d 1465 (5th Cir. 1984).

Respondents then filed a petition for writ of certiorari with this Court challenging the Fifth Circuits resolution of the case on three grounds. They were:

> 1. The writ should be granted to determine whether the United States Court of Appeals for the Fifth Circuit has miscontrued this Court's ruling in Enmund.
>
> 2. Alternatively, the writ should be granted to determine whether under the circumstances the Court of Appeals erred in concluding that Enmund should be applied retroactively.
>
> 3. The Court should grant the writ to determine whether the Court of appeals erred in failing to find that respondent's claims of ineffective assistance of counsel and failure to give a lesser included offense were porcedurally.

On February 24, 1986 this Court vacated the judgment of the Fifth Circuit and remanded the case for further consideration in light of

Cabana v. Bullock, ___ U.S.___, 106 S.Ct. 689, 88 L.Ed.2d 704 (1986). Thigpen v. Jones, ___ U.S._____, 106 S.Ct. 1172, 89 L.Ed.2d 292 (1986).

On remand the Fifth Circuit corrected its ruling so far as the Enmund portion of its prior opinion was concerned and then reached the ineffective assistance of counsel claim it refused to reach in its first opinion. The Court affirmed the District Court's finding that respondent had received ineffective assistance of counsel at the sentencing phase. From this judgment on remand this petition is taken.

REASONS FOR GRANTING THE WRIT

ARGUMENT

1. **Certiorari should be granted where the Court of Appeals and the District Court erred in not holding that Respondent's claim of ineffective assistance of counsel was procedurally in violation of Wainwright v. Sykes and Engle v. Isaac.**

The Court of Appeals failed to address the issue of ineffective assistance of counsel in its original opinion. Jones v. Thigpen, 741 F.2d at 805 (5th Cir. 1984). The Court of Appeals did not address, in either the original opinion or the present one, the state's claim that the issue of ineffective assistance of counsel was procedurally barred from consideration by the District Court.

In Engle v. Isaac, U.S. , 71 L.Ed.2d 783, 102 S.Ct. 1558 (1982), the Supreme Court held that waiver is a separate question from exhaustion. Where a claim can no longer be raised in state court it is considered exhausted, however this does not keep the question from having been waived. 102 S.Ct. at 1570, n. 28. Such was the position taken by the State concerning petitioner's allegations of ineffective assistance of counsel in the

District Court and in the Court of Appeals on the original appeal.

Respondent filed a coram nobis application with the Mississippi Supreme Court which was denied without opinion. The District Court held that the denial without opinion was a ruling on the merits. However the Mississippi Supreme Court in explaining the effect of its denial without opinions in King v. Thigpen, 441 So.2d 520 (Miss. 1980), specifically held that the District Court misintrepreted the order denying coram nobis relief as an opinion on the merits in respondents case. Respondent neither raised nor presented any allegation of ineffective assistance of counsel in the state courts. In fact the question of effective assistance was first raised when petitioner filed his amended petition for writ of habeas corpus before the District Court on February 24, 1982. The original petition without any

such allegation was filed on March 9, 1981. Petitioner has never offered any explanation for this obviously dilitory tactic.

In Read v. State, 430 So.2d 832 (Miss. 1983), the Mississippi Supreme Court held that claims of ineffective assistance of counsel could be waived just as any other constitutional right. More recently, in Evans v. State, 485 So.2d 276 (Miss. 1986), cert. denied ____ U.S. ____ [No. 85-6932, June 10, 1986], citing Read, the Mississippi Supreme Court, held a claim of ineffective assistance of counsel to have been waived because the claim was not presented when it could have and should have been presented. 485 So.2d at 280-81.

The law in Mississippi is clear, when you have a reasonable opportunity to raise a claim of ineffective assistance of counsel and do not do so then the issue is waived. This is

clearly what occurred in the case at bar. Not only did respondent never raise the question in state court, he did not raise it until a year after his federal petition was filed. Evans and Read are in complete accord with the long line of cases in Mississippi imposing procedural bars when a claim is not raised when it could have or should have been raised. See: Fugate v. State, 85 Miss. 94, 37 So. 554 (1904); Mitchell v. State, 179 Miss. 814, 176 So. 743 (1937); Wheeler v. State, 219 Miss. 129, 70 So.2d 82 (1954); Wetzel v. State, 76 So. 2d 194 (Miss. 1954); Wetzel v. State, 76 So.2d 846 (Miss. 1955); Goldsby v. State, 226 Miss. 20, 86 So.2d 27 (1956); Lang v. State, 230 Miss. 147, 92 So.2d 670 (1957); Gordon v. State, 150 So.2d 73 (Miss. 1964); Irving v. State, 194 So.2d 239 (Miss. 1967); Holloway v. State, 261 So.2d 799 (Miss. 1972); Auman v. State, 285 So.2d 146 (Miss. 1973); Harley v.

State, 264 So.2d 406 (Miss. 1972); In Re Broom's Petition, 251 Miss. 25, 168 So.2d 44 (1964); Callahan v. State, 426 so.2d 801, 803 (Miss. 1983). Consequently, the Court of Appeals' failure to reverse the District Court on this point because of its failure to adhere to the rulings in Engle v. Isaac, supra, and Wainwright v. Sykes, 433 U.S. 72 (1977), was error. The proper conclusion to have been have been reached by this Court and the District Court should have been that this point was waived and forfeited as it was not presented to the State court when it could have or should have been presented.

2. Certiorari should be granted where the Court of Appeals and the District Court erred in concluding that petitioner was denied effective assistance of counsel at the sentencing phase of his trial by a misapplication of the standard set forth in Strickland v. Washington.

While still maintaining that any argument concerning the claim of ineffective assistance of counsel is procedurally barred, we address the merits of the claim of ineffectiveness of counsel, this time in light of Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), reh. denied ___ U.S. ___, 82 L.Ed.2d 864, 104 S.Ct. 3562 (1984), as this case was not decided at the time of the District Court's consideration of the claim. Since the district court did not apply the proper standard the Court of Appeals' almost summary affirmance of the district court's holding is flawed.

In Strickland v. Washington, 466 U.S. 668, 80 L.Ed.2d 674, 693, 104 S.Ct. 2052 (1984), reh. denied ___ U.S. ___, 82 L.Ed.2d 864, 104 S.Ct. 3562 (1984), the Court articulated a two prong test to be used in determining whether or not counsel's performance meets constitutional muster.

A petitioner who seeks to overturn his conviction or sentence on grounds of ineffective assistance of counsel has the burden to demonstrate by sufficient factual proof, by a preponderance of the evidence, an identifiable lapse on the part of counsel, as well as some actual adverse impact upon the fairness of the trial which results from the lapse. Daniels v. Maggio, 669 F.2d 1075 (5th Cir. 1983); Boyd v. Estelle, 661 F.2d 388 (5th Cir. 1981); Washington v. Watkins, 655 F.2d 1346 (5th Cir. 1981). The determination of whether counsel renders reasonably effective assistance turns in each case on the totality of the facts in the entire record. Washington v. Estelle, 648 F.2d 276 (5th Cir. 1981).

Likewise, judicial scrutiny of counsel's performance must be highly deferential. A fair assessment of an attorney's performance requires every effort be made to eliminate the

distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Washington v. Watkins, supra. "Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" Strickland v. Washington, supra, 80 L.Ed.2d at 694-695, citing Michael v. Louisiana, 350 U.S. 91, 100 L.Ed.2d 83, 76 S.Ct. 158 (1955).

The claims presented in this case fall within what this Court referred to a "sound trial strategy". 80 L.Ed.2d at 695-96. See also: Gomez v. Beto, 462 F.2d 596 (5th Cir.

1972); Gaines v. Hopper, 575 F.2d 1147(5th Cir. 1978). Cf., Lovett v. State of Florida, 627 F.2d 706 (5th Cir. 1980); Washington v. Watkins, supra; Jones v. Estelle, 632 F.2d 490 (5th Cir. 1981); Beckham v. Wainwright, 639 F.2d 262 (5th Cir. 1981).

Complaints concerning counsel's alleged failure to file certain motions, call certain witnesses, ask certain questions, make certain objections, and similar activites fall within the ambit of trial strategy. Murray v. Maggio, 736 F.2d 279 (5th Cir. 1984); Solomon v. Kemp, 735 F.2d 395 (11th Cir. 1984).

This Court set out the test for the second or actual prejudice prong of the inquiry into the effectiveness of counsel as follows:

> "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence

in the outcome." 80 L.Ed.2d at 698. Further:

> When a defendant challenges a death sentence such as the one at issue in this case, the question is whether there is a reasonable probability that, absent the errors, the sentencer - including an appellate court, to the extent it independently reweighs the evidence - would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.

In making this determination, a court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury. Some of the factual findings will have been unaffected by the errors, and the factual the record is more likely to have been affected by errors that one with overwhelming record support. Taking the unaffected findings as a given, and taking due account of the effect of the errors on the remaining findings, a court making the prejudice inquiry must ask if the defendant has met the burden of showing that the decision reached would reasonably likely have been different absent the errors.

[Emphasis added] 80 L.Ed.2d at

698-99.

See also: Gomez v. McKaskle, 748 F.2d 1107 (5th Cir. 1984).

In the case at bar it is clear that the district court in relying mainly on Voyles v. Watkins, 489 F.Supp. 901 (N.D. Miss. 1980), used the wrong standard to test the question of effectiveness of counsel. In fact the Court of Appeals in Washington v. Watkins, 655 F.2d.1346 (5th Cir. 1981), rejected the "strict scrutiny" standard applied in Voyles. The Court of Appeals said:

> Washington contends on appeal that the Constitution demands "stricter scrutiny of the performance of an attorney whose client is sentenced to die." The only arguably direct support that he cites for this proposition is Voyles v. Watkins, 489 F.Supp. 901 (N.D. Miss. 1980), in which the district court held that "when the defendant has been convicted of a capital offense, courts must strictly scrutinize counsel's conduct." The Voyles court relied chiefly16 on the plurality opinion in Gardner v. Florida, 430 U.S. 349, 357-58, 97

S.Ct. 1197, 1204-05, 51 L.Ed.2d 393 (1977), which emphasized that"[i]t is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion." This, however has no direct correspondence to the constitutional standards for effective assistance of counsel. Insofar as Voyles indicates that the constitutional standards for effective assistance of counsel vary according to the severity of the punishment imposed upon the defendant, we must disagree.

. . .

Other than the Voyles case, Washington has not cited, and our own research has not revealed, any case in which the legal standards for constitutionally adequate assistance of counsel have been held to vary according to the severity of the punishment imposed upon the defendant. We refuse to so hold today.

[Footnotes omitted.] 655 F.2d at 1356-57.

The district court did not make the two pronged analysis required by Strickland, supra, but applied a heightened scrutiny test that has been rejected by this Court and by the United

States Supreme Court in Strickland, supra. The District Court held that under the authority of Voyles v. Watkins, supra, it did not have to make a prejudice inquiry. A104. The opinion of the Court of Appeals is not much better. In a factually flawed two paragraphs the Court basically parrots the District Court opinion without any independent analysis.

Further, the district court paints an incorrect picture of counsels actions during the sentencing phase of petitioner's trial. It is true that after the state presented two witnesses in the sentencing phase, trial counsel stated, "The defense rests, your Honor." 555 F.Supp. at 879. However, the trial did not end there. The defendant personally argued his case to the jury during the sentencing phase. TR. Vol. 4, p. 730-34; Dist. Ct. Tr., p. 166-67. Then defense counsel, Mr. Morris, made an argument to the

jury in petitioner's behalf. TR. Vol. 4, p. 734-36; Dist. Ct. TR., p. 167-71. [The total closing arguments were not recorded until the federal proceedings and were introduced into evidence in the district court.] Looking to these arguments we see the district court was incorrect in relying on a case that was reversed on the basis that defense counsel did nothing at all.

By relying on the testimony of mental health professionals presented by petitioner and respondent at the habeas hearing the Court indulges in the rankest from of hindsight determination of the issue effectiveness of counsel. The question to ask is not what is known or can be shown at the time of the habeas hearing, but what was known to the attorney at the time of trial. The trial in question was petitioner's second for this offense, the first being reversed. [Feb. 9, 1977, opinion is

found at TR. Vol. 1, p. 132-35.] Petitioner was examined prior to his first trial and a report was forwarded to the trial court and defense counsel. TR. Vol. 1, p. 146-147. It is clear that this information was known to counsel and to the trial court. See: Report of Trial Judge, TR. Vol. 1, p. 141-40. This examination was conducted at the Gulf Coast Mental Health Center by Dr. Clifton B. Davis, on March 12, 1975. Dr. Davis reached the following conclusions:

> MENTAL STATUS:
>
> Mr. Jones presents as one above, medium height, medium build, black male who appears his stated age. [18] He was dressed in faded blue overalls, a faded blue shirt and tennis shoes. There was a hand-cuff belt around his waist. He was alert, oriented and passively cooperative. There were no unusual mannerisms. Mood was somewhat depressed with appropriate affect. There was no spontaneous speech and answers to questions quite brief, but appropriate. Stream of thought and speech was lucid, relevant and coherent

> although he spoke in a very low voice. Insight and judgment seemed adequate, but intelligence was estimated to be borderline or lower. Thinking was on a concrete level which is consistent with his intellectual level. There was no evidence of overt integrative defect, nor evidence of hallucinations or delusions.
>
> IMPRESSION:
>
> Borderline or mildly retarded, without psychosis.
>
> I feel he is capable of determining right from wrong and is capable of assisting counsel in his own defense, consistent with his low intellectual level.
>
> TR. Vol. 1, p. 146-47.

This was the report that Morris, respondent's counsel, had to work with at the time of trial, not the findings of Dr. MacVaugh made many years later and introduced at the habeas hearing by petitioner. In any event Dr. MacVaugh's findings were disputed by Dr. Glen Anderson, which the district court recognized in footnote 7, and by Dr. Will Johnson, a

clinical psychologist, whose testimony the district court ignored. Dr. Johnson tested petitioner on two separate occassions because he felt that petitioner was malingering. He obtained test results that indicated that petitioner had a verbal I.Q. of 58, a performance I.Q. of 54 and a full scale I.Q. of 53. Because of petitioner's extreme uncooperativeness, Dr. Johnson, like Dr. Anderson, felt that petitioner was making a deliberate effort to appear "stupid" and that his actual I.Q. was "as high as 70 perhaps even higher." Transcript of Hearing at 71-77. The district court evidently decided to ignore these conclusions. By ignoring the State's evidence presented at the habeas hearing the District Court and thereafter the Court of Appeals in accepting the lower court's findings erred, by in effect placing the burden on the state.

In any event it really does not matter what the examinations done in preparation for the habeas hearing showed in 1982, we must look to what counsel had before him in 1977. We find from the state court record that the information defense counsel had was the report of Dr. Davis, quoted from above.

No inquiry was ever made by the District Court or the Court of Appeals as to why trial counsel did not chose to present peititioner's intelligence level as a mitigating factor. Respondent did not call trial counsel to testify at the hearing. The presumption is that counsels reasons were strategic for not presenting psychological evidence in mitigation. As the Court of Appeals recognized in Gray v. Lucas, 697 F.2d at 966, when it found that even though good character testimony and a mentally disturbed defense do not necessarily have to be inconsistent, "[counsel]

could have reasonably determined that in this case a local jury would perceive them to be inconsistent." Counsel could lhave decided to rely "primarily on closing argument to the jury." Burger v. Kemp, 753 F.2d 930, 934 (5th Cir. 1985). Morris minimized petitioner's involvement and pointed out his age to the jury. In Gray, the Court held this to be a tactical decision and did not constitute ineffective assistance of counsel. In this case all respondent has shown, taking the evidence in a light most favorable to him, was that there was evidence available to defense counsel that he was "[b]orderline or mildly retarded." Petitioner made no showing that counsel "neglected or ignored" this information. We do not have any idea why counsel made the decision that he did, because respondent did not bother to call Morris to the stand, although he was present in the court room during the habeas hearing. We can only

assume that the testimony of counsel would have been adverse to the position of respondent. Respondent offered no proof that the decision not to use the psychological information was not a strategic tactical decision on the part of counsel. Petitioner simply did not meet his burden and the district court relying on the tainted precedent of Voyles, supra, did not apply the test required by Strickland v. Washington, supra. Petitioner did not overcome the strong presumption that decisions of counsel are tactical. Counsel made a tactical choice and petitioner has not shown, by the mere introduction of contradicted testimony on petitioner's mental capacity that the choice not to put the information on was unreasonable. There must more. The mere fact that counsel does not put mitigating evidence on during sentencing is not sufficient to find that he was ineffective. This is clearly demonstrated by the decision in Berry v. King,

765 F.2d 451 (5th Cir. 1985), cert. denied, ___ U.S.____, 54 U.S.L.W. 3792 (June 2, 1986). A brief comparison of the facts of that case with those at bar make it clear that counsel is effective here. See Burger v. Kemp, 753 F.2d 930 (11th Cir. 1985) 933-940.

We would point out that the Court of Appeals further erred factually in holding that the mitigating circumstance of age was not presented to the jury by counsel. The fact that petitioner was 18 was brought out during he guilt phase of the trial. Futher the fact that petitioner was 18 was pointed out to the jury by petitioner when he made his personal argument to the jury and by his attorney during his argument to the jury. Dist. Ct. Tr., p. 165, 166, 169. Trial counsel told the jury that they could consider petitioner's age as a mitigating factor when considering sentence. Dist. Ct. Tr., p. 170. Further the jury was instructed it could consider age as a mitigating factor along with three other factors. TR. Vol. 4, p. 777-78.

From the record the whole theory of the defense, at sentence, was that there was a fourth member to the group that went to downtown Biloxi on the day of Arthur Weinberger's murder and that Larry Jones just happened to be with them. He argued that the case was at best a weak circumstantial evidence case and that he believed that petitioner was telling the truth when he stated that a fourth person named Roy was involved. Counsel's plea to the jury was that on this weak evidence they should not sentence petitioner to death because they would be taking away any chance for Roy to be located and come into court and clear petitioner of any actual involvement. He pointed out that the evidence did not show that Jones had actually killed Weinberger and that Willie Reddix, a co-defendant, had already received the death penalty for the crime. Although it cannot be said that a defense of mental retardation and one of minor participation are incompatable, neither can it

be said that to go with one and not the other is an unreasonable tactical choice in this case. See: Gray, supra.

Counsel's tactical choice was to have respondent argue his own case to the jury during the sentence phase of the trial. The introduction of evidence of borderline or mild mental retardation (the information had by defense counsel at the time of trial in 1977) could have been counterproductive to this trial strategy. Especially if respondent came across to the jury as being more intelligent than the testimony revealed.

The decision by the District Court and the subsequent affirmance of that judgment by the Court of Appeals, that petitioner's trial counsel was ineffective is totally at odds with the holdings Strickland v. Washington, supra; Burger v. Kemp, supra; Berry v. King, supra, Celestine v. Blackburn, 750 F.2d 353 (5th Cir. 1984); Moore v. Maggio, 740 F.2d 308 (5th Cir. 1984); Willie v. Maggio, 737 F.2d 1372 (5th Cir.1984).

CONCLUSION

For the above and foregoing reasons, petitioner respectfully submits that the petition for writ of certiorari in this case should be granted.

Respectfully submitted,

EDWIN LLOYD PITTMAN ATTORNEY GENERAL
STATE OF MISSISSIPPI

MARVIN L. WHITE, JR.
ASSISTANT ATTORNEY GENERAL
(COUNSE OF RECORD)

AMY D. WHITTEN
SPECIAL ASSISTANT ATTORNEY GENERAL

BY: Marvin L. White, Jr.
MARVIN L. WHITE, JR.

Office of the Attorney General
Post Office Box 220
Jackson, Mississippi 39205
Telephone: (601) 359-3680

CERTIFICATE OF SERVICE

I, Marvin L. White, Jr., an Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day caused to be mailed, via United States Postal Service, first-class postage prepaid, three (3) true and correct copies of the foregoing Petition for Certiorari to the Court of Appeals for the Fifth Circuit, to the following:

T. H. Freeland, III
T. H. Freeland, IV
Tim F. Whilson
Freeland & Freeland
Post Office Box 269
Oxford, MS 38655

This the 28th day of November, 1986.

Marvin L. White, Jr.
MARVIN L. WHITE, JR.

LARRY JONES

Petitioner-Appellee
Cross-Appellant,

V.

MORRIS THIGPEN, COMMISSIONER,
MISSISSIPPI DEPT. OF CORRECTIONS,
ET AL.,

Respondent-Appellants
Cross-Appellee.

United States Court of Appeals,
Fifth Circuit.

July 31, 1986.

ON PETITIONS FOR REHEARING
AND SUGGESTIONS FOR
REHEARING EN BANC

(Opinion May 2, 1986, 5 Cir., 1986,
788 F.2d 1101)

Before REAVLEY, JOHNSON and JOLLY, Circuit Judges.

PER CURIAM:

Both the State and petitioner have moved for rehearing of our most recent decision in this case at 788 F.2d 1101. One misstatement is called to our attention. We said there that

our prior writing on the effect of Beck v. Alabama, 447 U.S. 625, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980) was "mooted." Petitioner's argument under Beck that the conviction was tainted, because of the lack of an instruction on simple murder or a lesser included crime rather than capital murder, is not moot. It is, however, without merit.

We have previously dealt with the merits of this claim, but under Mississippi law the collateral attack is clearly barred. The petitioner has no complaint that a proper instruction was requested and denied him at his trial, nor was any complaint made in the direct appeal in the Mississippi courts. The procedural bar therefore stands. Gray v. Lucas, 677 F.2d 1086 (5th Cir. 1982).

Furthermore, petitioner would be entitled to an instruction on a lesser included offense only if the evidence would warrant a conviction for the lesser offense. We fail to find that evidence in this record. Nor do we detect any judicial coercion imposed upon the jury by their choice between a conviction for felony murder or an acquittal. This was the choice the evidence and petitioner presented to the jury.

The Petitions for Rehearing are DENIED and no member of this panel nor Judge in regular active serve on the Court having requested the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestions for Rehearing En Banc are DENIED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
NO. 83-4085

LARRY JONES

Petitioner-Appellee
Cross-Appellant,

V.

MORRIS THIGPEN, COMMISSIONER,
MISSISSIPPI DEPT. OF CORRECTIONS,
ET AL.,

Respondent-Appellants
Cross-Appellee.

Appeals from the United States District Court
for the Southern District of Mississippi

(May 2, 1986)

ON REMAND FROM SUPREME COURT OF THE UNITED STATES Before REAVLEY, JOHNSON and JOLLY, Circuit Judges.

REAVLEY, Circuit Judge:

By our decision in this case on September 17, 1984, reported at 741 F.2d 805, we held that the death sentence imposed by Mississippi upon Larry Jones for felony murder violated the Eighth Amendment under the Supreme Court's writing in Enmund v. Florida, 458 U.S. 782, 102 S.Ct. 3368, 78 L.Ed.2d 1140 (1982). The Supreme Court has vacated our judgment and remanded the case for further consideration in light of Cabana v. Bullock, ____U.S.____, 106 S.Ct. 689 (1986). We now correct our application of Enmund, proceed to the petitioner's other contentions of constitutional error in the sentence of the Mississippi court, and affirm the judgment of the trial court on the ground of ineffectiveness of counsel at the sentencing phase.

I. Enmund in The Light of Cabana

The evidence tended to prove that Larry Jones and Willie Reddix robbed a clothing store

and that the owner of the store died from a blow to his head received during the course of the robbery. The only evidence connecting Jones to the homicide was blood and his boot and complicity in the robbery. He was tried for the capital murder crime defined by Mississippi law in 1977 as a killing done "with or without any design to effect death" by a person engaged in a robbery. The jury was not asked to find that Jones killed or intended to kill the deceased. Seeing that as inconsistent with Enmund, in our 1984 decision we vacated Jones's death sentence and held that the Double Jeopardy Clause prevented its reimposition. Cabana informs us that we misunderstood Enmund. We are now taught that the Eight Amendment does not prohibit a state from enacting a crime of capital murder without a constituent element of an intent to kill, nor does the Eighth Amendment prevent a state jury from convicting and assessing the punishment of death for one found to have committed that

crime. Prior to the execution of a death sentence, however, the Eighth Amendment requirement of proportionality between culpability and death punishment must be met by a showing that the guilty person did kill or attempt to kill or intend to kill. The Constitution does not dictate the point in the process at which this determination of intent to kill must be made. It may be made in the course of collateral proceedings in state or federal court and meet Eighth Amendment requirements. The federal court, however, should look to the state to make this finding in the first instance, and if resolved there against the defendant petitioner, the finding is presumed to be correct by virtue of 28 U.S.C. §2254 (d), see Sumner v. Mata, 449 U.S. 539, 101b S.Ct. 764 (1981).

The extent of our misunderstanding of Enmund is shown by our former disposition of Jones' double jeopardy claim. We undertook to

review the evidence in the state trial to determine whether a properly instructed, rational jury could have found beyond a reasonable doubt that Jones killed or intended to kill. 741 F.2d at 812. The difficulty with that inquiry is that Jones was not tried or convicted by the Mississippi court for a crime that included an element of intent to kill. The search for evidence of an element not part of the state crime was as pointless as it was futile. The evidence clearly supported the conviction for the crime with which Jones was charged, and due process was fully met. Nothing in the Eighth Amendment, as explained by the Court in Cabana, would warrant our reversal of the Mississippi conviction for felony murder on the ground that the evidence

presented at the trial was legally insufficient. Therefore the Double Jeopardy Clause and Burks v. United States, 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978), could have no application to the case before us.[1]

If there were no other claim of constitutional error in the state sentencing, we would direct the issue of the writ of habeas corpus but leave to the State of Mississippi the opportunity of obtaining a determination in its own courts of whether Jones possessed the Enmund level of culpability. However, the

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[1] This also moots our writing on the effect of Beck v. Alabama, 447 U.S. 625, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980), which included what the Mississippi Supreme Court has since held to be a misreading of Mississippi law. See Fairchild v. State, 459 So.2d 793, 800 (Miss. 1984).

the trial court vacated the death sentenced on a second ground, that of ineffectiveness of counsel, which we now reach.[2]

II. Ineffectiveness of Counsel

Larry Jones is mentally retarded, was seventeen years old at the time of this crime, and was not proved to have had any intent or role in the homicide. The sentence is more easily understood when we learn about the conduct of defense counsel at the sentencing phase of the trial. He presented no proof to the jury of theses mitigating factors of age and mental disability. He presented no mitigating circumstances at all. When the prosecution rested, he rested.

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[2] Petitioner also claimed violation of Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968). For the reasons given by the district court we find no merit to that claim.

At the habeas hearing in the federal district court, a clinical psychologist who had examined Jones testified that his full I.Q. was less than 41, that he was emotionally disturbed, that he was severely limited in his capacity to think and did not understand what was happening around him. The psychologist and psychiatrist testifying for the State agreed that he was mentally retarded, although they thought his capacity exceeded the measure of his test results. Defense counsel either neglected or ignored critical matters of mitigation at the point when the jury was to decide whether to sentence Jones to death. We agree with the district judge that this failure was professionally unreasonable, and that it was prejudicial to the defendant in that there is a reasonable probability that had this

EDITOR'S NOTE

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evidence been presented, the jury would have concluded that death was not warranted. See Strickland v. Washington, ____U.S.____, 104 S.Ct. 2052, 2064-69 (1984).

The judgment of the trial court is therefore affirmed. The State of Mississippi is given the election by the district court's order of resentencing petitioner Jones in accordance with Mississippi Code Ann. § 99-19-101. Cabana considerations will also be met thereby, because the statute now requires that a jury imposing a sentence of death must find either that the defendant actually killed, attempted to kill, intended that a killing take place, or contemplated that lethal force would be employed.

AFFIRMED.

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1984

NO. 84-1237

MORRIS THIGPEN, COMMISSIONER,
MISSISSIPPI DEPT. OF CORRECTIONS,
ET AL.,

Respondents-Appellants
Cross-Appellees.

V.

LARRY JONES

Petitioner-Appellee
Cross-Appellant,

February 24, 1986. On petition for writ of certiorari to the United States Court of Appeals for the First Circuit. The motion of respondent for leave to proceed in forma pauperis is granted. The petition for writ of certiorari is granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Fifth Circuit for further consideration in light of Cabana v. Bullock, 484 US _____, 88 L.Ed.2d 704, 106 S.Ct. 689 (1986).

Larry JONES
Petitioner-Appellee
Cross-Appellant,

v.

Morris THIGPEN, Commissioner, et al.,
Respondents-Appellants
Cross-Appellees.

No. 83-4085.

United States Court of Appeals,
Fifth Circuit

November 1, 1984.

REAVLEY, JOHNSON and JOLLY, Circuit Judges.

On Petition for Rehearing and Suggestion for Rehearing En Banc.

DENIED.

Larry JONES, Petitioner-Appellee
Cross-Appellant,

v.

Morris THIGPEN, Commissioner, Mississippi
Dept. of Corrections, et al.,
Respondents-Appellants Cross-Appellee.

No. 83-4085.
United States Court of Appeals,
Fifth Circuit.

Sept. 17, 1984.

Defendant who had been sentenced to death upon his conviction of capital murder filed petition for writ of habeas corpus. The United States District Court for the Southern District of Mississippi, Dan M. Russell, J., 555 F.Supp. 870, denied relief with regard to defendant's conviction but vacated his death sentence. Appeal and cross appeal were taken. The Court of Appeals, Reavley, Circuit Judge, held that: (1) decision of the United States Supreme Court construing Eighth Amendment to

forbid imposition of death penalty against one who neither took life, attempted to take life nor intended to take life is subject to full retroactive application; (2) defendant's death sentence constituted cruel and unusual punishment because state offered insufficient evidence that defendant who participated in robbery killed or intended to kill robbery victim and because jury instructions did not require a finding that defendant killed or intended to kill victim before death penalty was imposed; (3) because state failed to produce sufficient evidence of personal culpability at first sentencing hearing, it was barred by double jeopardy clause from subjecting defendant again to the sentencing hearing at which he would face a possible death sentence; and (4) since Mississippi law defined no lesser included offense that might have applied to killing which occurred in course of robbery, trial court in capital

murder prosecution was not bound to deliver a lesser included offense instruction.

Affirmed in part; reversed in part and remanded with instructions.

E. Grady Jolly, Circuit Judge, specially concurred with opinion.

1. Courts 100(1)

Judicial decisions ordinarily apply retroactively.

2. Courts 100(1)

A decision establishing that certain conduct cannot constitutionally be punished involved the kind of fundamental guarantee that is not susceptible to solely prospective application.

3. Constitutional Law 267
Criminal Law 1159.2(3)

Jury findings both by their nature and as a matter of due process require sufficient

evidence to support them. U.S.C.A. Const.Amend. 5.

4. Courts 100(1)

Decision of United States Supreme Court construing Eighth Amendment to forbid imposition of death penalty against one who neither took life, attempted to take life, nor intended to take life is subject to full retroactive application. U.S.C.A. Const.Amend. 8.

5. Criminal Law 1213.8(8)

Death sentence imposed for felony-murder constituted cruel and unusual punishment because state offered insufficient evidence that defendant killed or intended to kill robbery victim and because jury instructions did not require a finding that defendant killed or intended to kill before imposing death penalty.

6. Criminal Law 163

Where state failed to produce sufficient evidence of personal culpability at first trial for felony-murder to support finding that accused killed, attempted to kill or intended to kill victim, as predicate for death sentence, it was barred by double jeopardy clause from subjecting defendant again to a sentencing hearing at which he would face a possible death sentence. U.S.C.A. Const.Amend. 5.

7. Homicide 308(2)

In view of fact that Mississippi law defined no lesser included offense that might have been applied to murder committed during course of robbery, trial court in capital murder prosecution was not bound to deliver a lesser included offense instruction. Miss.Code 1972, § 97-3-19.

Appeals from the United States District Court for the Southern District of Mississippi.

Before REAVLEY, JOHNSON and JOLLY, Circuit Judges.

REAVLEY, Circuit Judge:

Larry Jones was convicted in Mississippi of capital murder and was sentenced to death. After appealing his conviction and seeking collateral relief in the Mississippi state courts, Jones filed this petition for habeas corpus. The district court denied relief with regard to Jones' conviction but vacated his death sentence on the grounds that he received ineffective assistance of counsel at the sentencing hearing and that the sentence violated Enmund v. Florida, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982). The district court authorized the State, if it so chose, to hold a new sentencing hearing at which Jones would again face the possibility of a death sentence. We affirm in major part, but

hold that, because the State failed once to produce evidence of Jones' personal culpability sufficient under Enmund it is now barred by the Double Jeopardy Clause from trying a second time.

I

This is a classic case of felony murder with no eye witnesses. On the morning of December 2, 1974, petitioner Larry Jones and his friend Willie Reddix persuaded Willie's brother J.D. Reddix to drive them to downtown Biloxi in J.D.'s gray Cadillac. Neither Jones nor Willie told J.D. why they needed to go into Biloxi. J.D. drive his brother and Jones downtown and parked the car. J.D. would later testify that Jones was wearing combat boots and that Jones and Willie got out of the car and headed toward Howard Avenue, the general direction of Art's Levis, a clothing store owned by Arthur Weinburger, Lula Mae Bell, the

aunt of Willie and J.D., happened to be downtown shopping that day. After first saying she had not seen Jones and Willie downtown, Bell testified that she saw Jones and Willie get out of J.D.'s car. She remembered that Jones wore fatigues and combat boots.

Orvell McGee was doing road work in Biloxi on the morning of December 2 when he noticed two black men get out of a parked Cadillac at about 11:45 and walk toward Howard Avenue. He remembered that one man, the driver, stayed in the car. Preston Sullivan was also downtown that day. He parked his car about a block from Art's along Howard, and as he walked toward the store, Sullivan noticed a black man carrying a Navy P-coat over his shoulder emerge into the street "in the vicinity of" Art's and head east. Sullivan walked past the man and into the store, where he found Arthur Weinburger lying wounded and unconscious. Sullivan

summoned help. He would later testify that he found Weinburger between 11:30 and 11:45.

Lula Mae Bell testified that she saw Willie with a coat over his shoulder running east along Howard. Ray Real was on his way back from lunch at about 11:45, according to his testimony, when he saw a black man carrying a footlocker and walking west along Howard. Orvell McGee was still at work when he saw the two men who had left the car return. He recalled at trial that they came from different directions - one wore combat boots, carried a footlocker, and returned from the direction of the Kennedy Marie Building; the other had a leather coat over his shoulder and returned from Howard Avenue. The men had left the car with neither a footlocker nor a coat. Neither McGee, Sullivan, nor Real could identify the men they saw that day.

J.D. testified that he waited about 15 minutes before Jones and Willie returned. He testified that Jones came back by Kennedy Marine and that he was carrying a blue footlocker. Willie returned from the direction of Howard Avenue and carried a jacket. The two got into the car and told J.D. to drive back to the Reddix house. They never told J.D. what happened. Annie Reddix, the mother of Willie and J.D., testified that Jones brought a footlocker into her house on December 2. He said it was his, and she let him leave it there. She also testified that Jones was wearing combat boots when he arrived at her house, but that he changed into tennis shoes shortly thereafter.

The investigation proceeded quickly after J.D. was arrested wearing some of the clothing stolen from Art's. Police searched Annie Reddix's house the afternoon after the robbery

and found the footlocker full of clothes; an employee at Art's later identified both the trunk and its contents as having been stolen from the store. Authorities also found a pair of combat boots; later tests revealed that the boots were stained by human blood, particularly the cloth top of the right boot.

Jones was tried in December 1977. [1] J.D. Reddix testified about his drive to Biloxi with Larry and Willie on December 2, 1974. According to J.D., the two said nothing beforehand about what they planned to do downtown and never told him afterward what had happened while he waited in the car. Orvell

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[1] Jones' first trial, in March 1975, ended in a conviction and sentence of death. On direct appeal, the Supreme Court of Mississippi reversed and remanded for a bifurcated proceeding as required by Jackson v. State, 337 So.2d 1242 (Miss. 1976). Jones v. State, 342 So.2d 735 (Miss. 1977).

McGee and Preston Sullivan testified about what they saw that day, as did Ray Real, but none of these witnesses identified Willie or Larry as the man they saw and none offered any hint about what happened inside Art's store. J.D. testified that Jones wore combats that day, and the State introduced the boots found stained with blood in the Reddix home. An Art's employee also identified the footlocker and clothes found at the Reddix house as having been stolen from the store.

Jones was accused of "capital murder," defined in Mississippi to include a killing done "with or without any design to effect death" by a person engaged in a robbery. Miss.Code Ann. § 97-3-19 (Supp. 1983). Thus, the trial court apparently delivered a typical felony murder instruction to the jury. [2]

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[2] Inexplicably, the record does not contain the instructions actually given at Jones' trial.

Defense counsel had not requested and the trial court did not give any instructions authorizing the jury to find Jones guilty of a lesser included offense - they were either to find the defendant guilty or not guilty of capital murder. Their verdict was guilty. The court immediately proceeded with the separate sentencing hearing required by Mississippi statute. See Miss.Code Ann. § 99-19-101 (Supp. 1983). The State introduced evidence of the victim's age and size, photographs of the victim taken at the hospital, and evidence of Jones' 1975 armed robbery conviction; the defense offered no evidence at the sentencing hearing. Part of the defendant's final argument was delivered by Jones himself, who sought to persuade the jury that the two black men involved in the robbery were Willie and a man named Roy or Royce. The court instructed the jury about the aggravating and mitigating

circumstances according to Mississippi's capital punishment statute, and the jury returned its verdict the next morning sentencing Jones to death.

Jones appealed to the Mississippi Supreme Court, arguing among other things that the evidence at trial was insufficient to show that he "was actively engaged in an assault upon the victim in the course of the robbery," and that the trial court violated Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968). After reviewing the circumstantial evidence we have already recited, the Mississippi court rejected Jones' claim that the evidence was insufficient to show that he actually assaulted Weinburger. Jones v. State, 381 So.2d 983, 987-89 (Miss.), cert. denied, 449 U.S. 1003, 101 S.Ct. 543, 66 L.Ed.2d 300 (1980). The State need not have shown Jones' "precise role" in the killing,

reasoned the court because Mississippi's definition of capital murder includes a killing "done with or without any design to effect death . . .." 381 So.2d at 989 (quoting Miss.Code Ann. § 97-3-19(2)(e). [3] The court then rejected Jones' Witherspoon claim, id. at 992, and affirmed both his conviction and sentence.

Jones sought collateral review according to state procedure on March 3, 1981, by moving the Mississippi Supreme Court for leave to petition the trial court for a writ, either of error coram nobis or of habeas corpus. See Miss.Code Ann. § 99-35-145 (1973). Jones challenged his conviction on several grounds,

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3 The court noted, however, that Jones had not argued "that the legislature lacks the power to expose him to guilt of capital murder in the absence of proof that he had specific intention to kill." Id. at 989.

among them that the facts required the trial court to instruct the jury on "the lesser included offense of simple murder," and that the court's failure to deliver such an instruction violated Beck v. Alabama, 447 U.S. 625, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980). He also argued that his death sentence constituted cruel and unusual punishment for several reasons, including the fact that he was convicted under Mississippi's capital murder statute with no finding that he killed or intended to kill Arthur Weinburger. [4] The

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[4] Jones also reargued his Witherspoon claim, contended that he had not had sufficient time to prepare for the sentencing hearing, and repeated his argument that he could not be convicted of capital murder under Mississippi law merely because he participated in the robbery. In his last connection, he asserted that state law required proof that he, not an accomplice, "committed or participated in the commission of the murder."

State responded to most of Jones' arguments on their merits. The single relevant exception was its answer to the Beck claim, in which the State noted that Jones had not requested an instruction on lesser included offenses at trial and had never presented the Beck argument at any stage in the state proceedings. The Mississippi Supreme Court denied the motion with no explanation on April 1, 1981:

> This day this cause came onto be heard on motion for leave to file petition for writ of error coram nobis and/or for a writ of habeas corpus and this Court having sufficiently examined and considered the same and being of the opinion that the same should be denied doth order that said motion be and the same is hereby denied.

Jones had filed his petition for federal habeas on March 9, 1981, shortly after moving for collateral relief in the Mississippi Supreme Court. To the extent they remain on

appeal, Jones' arguments in support of federal habeas relief were that his conviction violated due process under Beck because of the trial court's failure to instruct on a lesser included offense; that the jury was selected in violation of Witherspoon; that he received ineffective assistance of counsel at the sentencing hearing; and that his sentence to death with neither finding nor proof that he killed or intended to kill constituted cruel and unusual punishment. The State's response concerning the exhaustion requirement was ambiguous. Noting first that Jones had raised "certain grounds" in his federal petition that had not first been presented to the state courts, the State explicitly waived the exhaustion requirement in the interest of obtaining "expeditious consideration." In the same paragraph, however, the State expressed its intention to rely on the argument that

"[t]here are independent and adequate state procedural grounds which prevent review here of certain issues which could have [been] but were not raised in the State Court system."

After two hearings, the district court issued its opinion and order granting relief with regard to Jones' sentence. 555 F.Supp. 870 (S.D. Miss. 1983). The court considered state remedies to be exhausted with regard to all grounds asserted by Jones: they were all presented on motion for collateral relief to the Mississippi Supreme Court, which was presumed to have reached the merits in the absence of its expressed reliance on a state procedural default committed by Jones. The district court then rejected Jones' Witherspoon and Beck claims on their merits. It set aside the death sentence for two alternative reasons, however. First, the sentence constituted cruel and unusual punishment under Enmund for lack of

a finding by the jury that Jones killed, attempted to kill, or intended to kill. Second, Jones received ineffective assistance of counsel at the sentencing hearing because his attorney failed to present evidence that Jones was mildly mentally retarded. The court authorized the State to hold a new sentencing hearing, expressly rejecting Jones' argument that such a hearing would violate the Double Jeopardy Clause.

II

Enmund v. Florida, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982), construed the Eighth Amendment to forbid imposition of the death penalty against "one who neither took life, attempted to take life, nor intended to take life." Id. at 786, 102 S.Ct. at 3371. Jones' major claim, therefore, is that his death sentence must be set aside because here was neither a finding nor sufficient evidence

to support a finding that Jones killed or intended to kill Arthur Weinburger in the course of robbing his store. [5] The district court agreed that the jury instructions in both the guilt and sentencing phases of Jones' trial failed to require a finding that Jones killed or intended to kill. Its opinion includes a footnote, however, stating that the record contains "evidence . . . from which a jury

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[5] This claim is properly before us, for the State has waived the exhaustion requirement and asserts no procedural default with respect to the Enmund claim that might bar federal review. See McGee v. Estelle, 722 F.2d 1206 (5th Cir. 1984) (en banc). Despite its waiver of the exhaustion requirement, the State cryptically urges that we certify to the Mississippi Supreme Court the question "whether as a matter of State law the petitioner intended that a killing would take place." The question of intent is one of fact and evidence, not law. We therefore decline the State's invitation.

could determine the petitioner's individual culpability." The court therefore vacated Jones' death sentence, but extended the State an opportunity to resentence Jones to death after a new hearing and upon a finding consistent with Enmund.

A

The State argues first that Enmund ought not be retroactively applied. It argues uphill, for we recently applied Enmund to vacate the death sentence imposed on Jones' accomplice, Willie Reddix, only days before Jones was tried. Reddix v. Thigpen, 728 F.2d 705 (5th Cir. 1984); see also Skillern v. Estelle, 720 F.2d 839 (5th Cir. 1983); Bell v. Watkins, 692 F.2d 999 (5th Cir. 1982) (like Skillern, applying Enmund retroactively and denying relief on that ground), cert. denied, ___ U.S. _____, 104 S.Ct. 142, 78 L.Ed.2d 134 (1983). But because the State did not argue in

Reddix that Enmund should apply only prospectively, we pause to consider the issue.

[1] Judicial decisions ordinarily apply retroactively. See Robinson v. Neil, 409 U.S. 505, 507-08, 93 S.Ct. 876, 877-78, 35 L.Ed.2d 29 (1973). "Indeed, a legal system based on precedent has a built-in presumption of retroactivity." Solem v. Stumes, ____ U.S. _____, _____, 104 S.Ct. 1338, 1341, 79 L.Ed.2d 579 (1984). In 1965, however, the Supreme Court began to shape a retroactivity analysis to be applied when it announced rules of a procedural character. Linkletter v. Walker, 381 U.S. 618, 85 S.Ct. 1731, 14 L.Ed.2d 601 (1965); see Desist v. United States, 394 U.S. 244, 89 S.Ct. 1030, 22 L.Ed.2d 248 (1969). But cases articulating certain fundamental guarantees do not lend themselves to the retroactivity analysis established in Linkletter and systematized in Desist. See

Robinson, 409 U.S. at 508, 93 S.Ct. at 878. Among those guarantees that have been excluded from normal Linkletter analysis are the Eighth Amendment prohibition against capital punishment announced in Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972), see, e.g., Stewart v. Massachusetts, 408 U.S. 845, 92 S.Ct. 2845, 33 L.Ed.2d 744 (1972) (per curiam), and the Fifth Amendment's prohibition against double jeopardy. See, e.g., Robinson, 409 U.S. at 510-11, 93 S.Ct. at 879.

[2] A decision establishing that certain conduct cannot constitutionally be punished involves just the sort of fundamental guarantee that is not susceptible to solely prospective application. See United States v. United States Coin and Currency, 401 U.S. 715, 91 S.Ct. 1041, 28 L.Ed.2d 434 (1971). Indeed, the Supreme Court immediately applied retroactively

its holding in Coker v. Georgia, 433 U.S. 584, 97 S.Ct. 2861, 53 L.Ed.2d 982 (1977), that the Eighth Amendment forbade execution of a defendant convicted of raping an adult woman. See Eberheart v. Georgia, 433 U.S. 917, 97 S.Ct. 2994, 53 L.Ed.2d 1104 (1977); Hooks v. Georgia, 433 U.S. 917, 97 S.Ct. 2994, 53 L.Ed.2d 1104 (1977). Coker was the last time before Enmund that the Court had prohibited capital punishment for a certain species of criminal conduct, and it provided the Eighth Amendment analysis followed five years later by the Enmund Court.

Enmund absolutely forbids a form of punishment, death, when the accused is not shown and found to have killed or attempted to kill or intended to kill. We cannot imagine applying such a holding only prospectively and, simply because Jones' trial predated the Enmund decision, allowing Jones' execution to proceed

in the face of Enmund's holding that it would constitute cruel and unusual punishment. The State does actually argue that Enmund's holding is merely procedural and should therefore be applied only prospectively. The patent frivolousness of such an argument is nicely focused by Jones' statement of the issue: "Should Enmund be applied retroactively, or should the state be permitted one last cruel and unusual punishment before Enmund takes effect?"

[3] The only other imaginable application of Enmund short of full retroactivity is to extend back in time its requirement of a finding that the accused killed or intended to

kill, but to apply only prospectively its requirement of sufficient evidence to support that finding. [6] First, such an application dishonors Enmund by divorcing its fundamental requirement of a jury finding from the logically inextricable requirement that such a finding be supported by sufficient evidence in the record. Jury findings both by their nature and as a matter of due process require sufficient evidence to support them. See

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6 Such an application is suggested by the fact that the State urges its retroactivity argument here, in apparent anticipation of our holding that the evidence of intent to kill was insufficient, but not in Reddix, where the evidence of intent was predictably held adequate. In Jones, retroactive application of Enmund bars the State from ever imposing the death penalty, see section III(c), infra (double jeopardy analysis); in Reddix it worked no such result. See Reddix, 728 F.2d at 710-11.

Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). We have at least implied that Enmund includes a sufficiency-of-the-evidence component, see, Reddix, 728 F.2d at 710; Skillern, 720 F.2d at 843-49, and our careful review of the Court's opinion confirms that view. We find no basis in Enmund to detach a jury finding from the evidence or lack of evidence to support it.

Even the considerations underlying Linkletter and Desist suggest that Enmund be applied retroactively with its full force. The State's major concern is that law enforcement authorities may have relied on the state of the law before Enmund came down in 1982. It argues that the only signposts on the way to Enmund were the cases concerning nonstatutory mitigating factors that focused on the "concept of individualized sentencing." Lockett v. Ohio, 438 U.S. 586, 602, 98 S.Ct. 2954, 2963,

57 L.Ed.2d 973 (1978); see also Washington v. Watkins, 655 F.2d 1346, 1367-77 (5th Cir. 1981), cert. denied, 456 U.S. 949, 102 S.Ct. 2021, 72 L.Ed.2d 474 (1982). Enmund was neither a "clear break from the past," Desist, 394 U.S. at 248, 89 S.Ct. at 1033, nor "distinctly foreshadowed" by earlier cases. Brown v. Louisiana, 447 U.S. 323, 336, 100 S.Ct. 2214, 2224, 65 L.Ed.2d 159 (1980) (plurality). It followed the analysis in Coker v. Georgia, 433 U.S. 584, 97 S.Ct. 2861, 53 L.Ed.2d 982 (1977), a decision announced only six months before Jones' trial, but was by no means the necessary consequence of Coker's holding. Nevertheless, Coker offered thoughtful prosecutors the jurisprudential tool with which they might at least have anticipated the problem resolved in Enmund.

More reassuring is the simple impulse of law enforcement authorities to collect and

present whatever relevant evidence is available. Nothing before Enmund gave one prosecuting a felony murder case any reason to hesitate about offering available proof that a particular defendant either killed or harbored an intent to kill. We are confident that had such admissible evidence been available, the State would have presented it, either at Jones' trial or during the sentencing hearing.

Finally, our fully retroactive application of Enmund works no seriously disruptive effect on the administration of justice. The State wildly exaggerates by suggesting that our decision will affect all death row inmates in each of the seven states that imposed capital punishment for felony murder at the time Enmund was decided. Even if that prospect troubled us, we believe the prediction unjustified. The Enmund Court itself noted that its holding touched only a handful of death row inmates.

458 U.S. at 791-97, 102 S.Ct. at 3375-76. We know of no other case in which an Enmund claim has succeeded on grounds of insufficient evidence, and we are led to believe that most of the few death sentences based on felony murder convictions are supported by Enmund evidence sufficient under the Jackson standard. The double jeopardy bar will be infrequent indeed.

[4] In light of Jones' sufficiency argument and of our obligation to reach claims that may bear double jeopardy significance, see French v. Estelle, 692 F.2d 1021 (5th Cir. 1982), modified on other grounds, 696 F.2d 318 (5th Cir.), cert. denied, ____ U.S. ____, 103 S.Ct. 2108, 77 L.Ed.2d 313 (1983), we can find no basis consistent with the purposes behind Enmund and the policies served by the Double Jeopardy Clause to dissect the Enmund rationale to avoid a double jeopardy bar.

B

[5] Enmund requires that before a state may impose the uniquely severe and irrevocable sentence of death it must "focus on the personal intent and culpability of the defendant himself, and not merely that of an accomplice." Reddix, 728 F.2d at 708. To that end, the Curt established an Eighth Amendment principle that exists at two levels: first, an accused may not constitutionally receive the death penalty except upon a finding that he himself killed, attempted to kill, or intended to kill; and second, he may not be sentenced to death unless that finding is supported by sufficient evidence in the record. See Skillern, 720 F.2d at 843-49.

Jones contends that the evidence was insufficient to support any possible finding that he participated in killing Arthur Weinburger or that he intended the killing to

take place. We are therefore to determine whether the evidence was such that a properly instructed, rational jury could have found beyond a reasonable doubt that Jones killed or intended to kill. [7] Skillern, 720 F.2d at 844; see Jackson v. Virginia, 443 U.S. 307, 324, 99 S.Ct. 2781, 2791-92, 61 L.Ed.2d 560 (1979).

The State rests its position that the evidence was sufficient on only two grounds: [8]

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7 The claim is before us, for it was raised below and rejected by the district court. 555 F.Supp. at 879 n. 8.

8 The State would also distinguish Enmund on its facts. Enmund drove a get-away car and was outside the house as his accomplices killed the Kerkseys within, argues the State; Jones was at least physically present at the scene of the killing. The distinction is without a difference, however, for like Enmund, Jones himself has not been shown to have killed or intended to kill. His presence

first, the mass of circumstantial evidence quite compellingly shows that Jones participated in the robbery of Art's Levis; and second, the blood found on Jones' combat boots - particularly on the top of one boot - allows a fair inference that Jones was present when Weinburger was killed. [9] Our question after Enmund is whether the evidence was sufficient to show that Jones himself actually killed or intended to kill. After searching the record, we conclude it was not.

The record is more than sufficient to show that Jones and Willie Reddix robbed Art's Levis, that its owner was killed in the course of that robbery, and that Jones was present when the killing occurred. But the evidence

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(Footnote 8 Continued)

at the scene supports no such inference.

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9 The State also relies on the fact that Jones returned to J.D.'s car with some of the items stolen from Art's.

concerning events before and after the robbery offers no indication which robber killed Weinburger, cf. Ross v. Hopper, 716 F.2d 1528, 1533 (11th Cir. 1983) (evidence sufficient to show that accused actually killed victim), reh'g en banc granted, 729 F.2d 1293 (11th Cir. 1984), or that either man intended in advance that the killing would take place. Cf. Skillern, 720 F.2d at 844 (evidence sufficient to show accused agreed with accomplice before robbery that victim would be killed); Stanley v. Zant, 697 F.2d 955, 972-73 (11th Cir.) (same), rev'd on other grounds, ___ U.S. _____, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983). The nature of the murder itself supports no inference that both Jones and Willie played a part, and we find no evidence about possession or ownership of the murder weapon. The only direct evidence of what happened inside the store was the presence of

blood stains on the top of Jones' combat boots. Circumstantial evidence places Jones in the store with Willie Reddix at the time Weinburger was killed and the blood stains may place him near the victim, but we find absolutely nothing to show that he actually

killed or even intended any physical harm to Weinburger. See Turner v. McKaskle, 721 F.2d 999, 1002 (5th Cir. 1983). [10]

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10 See also Clark v. Maggio, 737 F.2d 471 (5th Cir. 1984). Clark participated in the 1975 robbery of a motel in the course of which a night bookkeeper was killed. He was indicted, convicted and sentenced to death under Louisiana's first degree murder statute, which required proof that Clark intended to kill or inflict great bodily harm. The Louisiana Supreme Court vacated his death sentence and remanded for resentencing to life imprisonment. We held that mere participation in a robbery is insufficient under Jackson to support a finding of intent on the part of one robber in connection with a murder committed by another. Id., at 474 (citing Clark v. Louisiana State Penitentiary, 694 F.2d 75, 78 (5th Cir. 1982). We found no prejudice to Clark, however, because he ultimately received the same sentence as would have been available under Louisiana's second-degree felony murder statute, which required no proof of intent.

This result may at first seem inconsistent with Reddix, in which we found evidence sufficient for a reasonable jury to have concluded that Willie Reddix "had a personal criminal intent justifying the imposition of the death penalty." 728 F.2d at 710. But Reddix differs from this case in one crucial respect: Reddix confessed; Jones did not. Reddix stated in his confession that he participated in Weinburger's killing by diverting the victim's attention while Jones hit him from behind. Id. at 711 n. 6. That confession is obviously not a part of our record, and Willie Reddix did not testify against Jones.

Jones also contends that Enmund's other prong was violated because the jury was never required to make a finding whether Jones killed or intended to kill. The State apparently does not argue that the instructions given in this

case required a jury finding consistent with Enmund. Although the instructions given at the guilt phase of Jones' 1977 trial are not in the record, [11] the State does not argue that they differed materially from Mississippi's statutory definition of capital murder, which

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11 The record does contain the instructions given at Jones' trial in 1975. Those instructions unmistakably allowed the jury to convict without proof that Jones killed Weinburger or that he intended that the killing take place.

does not require proof that the accused killed or intended to kill. See Miss.Code Ann. § 97-3-19 (Supp. 1983). [12] We do have an instruction given at the sentencing hearing, but nowhere did it require the jury to find that Jones killed or intended to kill before imposing the death penalty. Cf. Skillern v. Estelle, 720 F.2d 839 (5th Cir. 1983)

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[12] Mississippi has since amended its death penalty statute to require an Enmund finding:

> In order to return and impose a sentence of death the jury must make a written finding of one or more of the following:
> (a) The defendant actually killed;
> (b) The defendant attempted to kill;
> (c) The defendant intended that a killing take place;
> (d) The defendant contemplated that lethal force would be employed.

Miss.Code Ann. § 99-19-101(7) (Supp. 1983).

(instruction at sentencing phase cured Enmund flaw). We therefore agree with the district court that the jury instructions in this case were insufficient to support a death sentence.

Jones' death sentence constitutes cruel and unusual punishment under Enmund because the State offered insufficient evidence that Jones killed or intended to kill Weinburger and because the jury instructions did not require a

finding consistent with Enmund before the death penalty was imposed. [13] We now consider whether the State may again expose Jones to a possible death sentence.

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13 Enmund does not require that we disturb Jones' conviction. The "capital murder" statute under which he was convicted defines the offense usually termed felony murder as a killing done "with or without any design to effect death" by anyone engaged in the commission of certain crimes, one of which is robbery. Miss.Code Ann. § 97-3-19 (Supp. 1983). We have already noted that the capital murder statute "does not require imposition of capital punishment, and the Eighth Amendment, as interpreted by Enmund, is not implicated as long as the sentence imposed is not capital punishment." Reddix, 728 F.2d at 708 (footnote omitted; emphasis in original); see Skillern, 720 F.2d at 846-47. Cf. Clark v. Maggio, 737 F.2d 471 (5th Cir. 1984) (considering effect of prosecution's failure to prove intent under Louisiana's first degree felony murder statute, which required such proof).

C

[6] Jones argues that the Double Jeopardy Clause prevents the State from subjecting him again to a sentencing hearing at which he would face a possible death sentence. The district court anticipated Skillern in its view that an Enmund violation ordinarily may be cured by a new sentencing hearing with a jury properly instructed according to Enmund that death may be imposed only on a finding that the accused killed, attempted to kill, or intended to kill. Jones contends, however, that Enmund's is a rule of evidentiary sufficiency, and that because the State failed to produce sufficient evidence of personal culpability at the first trial it is barred by the Double Jeopardy Clause from a second chance. We agree with Jones and therefore reverse the district court's judgment to the extent that it allows the State again to place Jones in jeopardy.

We focus on the relationship of two watershed Supreme Court decisions. First, Bullington v. Missouri, 451 U.S. 430, 101 S.Ct. 1852, 68 L.Ed.2d 270 (1981), held that one accused of a capital crime but sentenced by a jury to life after a bifurcated proceeding similar to Mississippi's may not on retrial again be placed in jeopardy of receiving the death penalty. After Bullington, a capital sentencing proceeding like Mississippi's is regarded as a second "trial" at which the prosecution must again "prove its case" if it

is to obtain a death sentence. See Arizona v. Rumsey, _____ U.S. _____, 104 S.Ct. 2305, 81 L.Ed.2d 164 (1984). [14] Second, Burks v. United

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[14] Mississippi does not seek to distinguish its bifurcated sentencing proceeding from that of Missouri analyzed in Bullington; the two are similar in all relevant respects. That fact, together with the Supreme Court's recent decision in Rumsey, leads us to distinguish Knapp v. Cardwell, 667 F.2d 1253, 1264-65 (9th Cir.) (relying in part on fact that sentencer was judge, not jury; Rumsey later rejected the distinction), cert. denied, 459 U.S. 1055, 103 S.Ct. 473, 74 L.Ed.2d 621 (1982). Knapp merely held that Bullington does not raise a double jeopardy bar at a second sentencing hearing as to each aggravating circumstance found not to exist at the first sentencing hearing. Aggravating circumstances are applied together and in the disjunctive to justify imposition of a death sentence. Enmund's requirement is absolute - no defendant may be sentenced to die but upon proof he killed, intended to kill, or attempted to kill; the prosecutor's failure to produce

States, 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978), established an exception to the usual rule that a convicted defendant who prevails in his appeal is subject to retrial. See Tibbs v. Florida, 457 U.S. 31, 39, 102 S.Ct. 2211, 2217, 72 L.Ed.2d 652 (1982). Burks construed the Double Jeopardy Clause to preclude retrial

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(Footnote 14 Continued)

> sufficient evidence to support such a finding at the first sentencing cannot, consistently with the Double Jeopardy Clause, be given a second chance.

if the reviewing court found the evidence legally insufficient to support a conviction. [15] See Greene v. Massey, 437 U.S. 19, 98 S.Ct. 2151, 57 L.Ed.2d 15 (1978) (applying Burks to the states). Burks interacts with Bullington: if the jury under Bullington or an appellate court under Burks

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15 The Supreme Court's recent Justices of Boston Municipal Court v. Lydon, ____ U.S. ____, 104 S.Ct. 1805, 80 L.Ed.2d 311 (1984), does not affect Burks' recognition that retrial is barred upon a reviewing court's determination that the evidence at the first trial was legally insufficient. Lydon recast Burks' holding in terms of continuing jeopardy, but held only that initial jeopardy does not terminate without some event - either an acquittal or a judicial determination of evidentiary insufficiency. ____ U.S. at _____, 104 S.Ct. at 1813-14. Bound to reach Jones' claim of insufficient evidence, French, 692 F.2d at 1024, we uphold that claim; this decision therefore terminates Jones' initial Bullington jeopardy.

finds the prosecution's evidence in support of the death penalty insufficient, the defendant cannot again be made to face a possible death sentence. [16] Our interpretation of the Double

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16 The State argues that Tapp v. Lucas, 658 F.2d 383 (5th Cir. 1981), cert. denied, ____ U.S. ___, 102 S.Ct. 2233, 72 L.Ed.2d 845 (1982), somehow requires a different result. The Mississippi Supreme Court had reversed Tapp's conviction on the ground that his wife should not have been forced to testify; in its opinion, that court noted that without the wife's testimony "the record on the first trial . . . would not sustain a conviction." Tapp v. State, 347 So.2d 974, 977 (Miss. 1977). We rejected Tapp's double jeopardy challenge after his second trial: "Because the Mississippi Supreme Court made clear that Tapp's first conviction was reversed for trial error, . . . Tapp's second trial was not precluded by the double jeopardy clause." 658 F.2d at 385. Tapp has no bearing here, for we have concluded that the evidence supporting Jones' death sentence was indeed insufficient.

Jeopardy Clause is limited in major part by the considerations that underlie the retroactive application of intervening authority. Were Enmund's holding and its constitutional basis such that it might apply only prospectively, no Double Jeopardy bar would arise. But as we have already discussed, Enmund's rationale requires retroactive application. It follows necessarily from that conclusion and from Burks

and Bullington that the Double Jeopardy Clause now forbids the State from placing Jones again at risk of receiving a death sentence. [17]

III

[7] Jones challenges his capital murder conviction in only one argument remaining on appeal. He contends that he was denied due process under Beck v. Alabama, 447 U.S. 625, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980), by the

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17 Having concluded that Jones' death sentence violates Enmund, we need not reach petitioner's claim that he was denied effective assistance of counsel at the 1977 sentencing hearing. We also do not reach his claim that the trial court's exclusion of certain jurors violated Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968), for such a claim draws into question only a death sentence and has no bearing on the underlying conviction. Id. at 522 n. 21, 88 S.Ct. at 1777 n. 21; see Alderman v. Austin, 695 F.2d 124, 126 (5th Cir. 1983) (Unit B) (en banc).

trial court's failure to instruct the jury that they might convict him of the lesser included offense of simple murder. The argument is without merit for several reasons. [18]

Beck held that the death penalty could not be imposed because the trial court had

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18 The State vigorously maintains that our review of this claim is barred because Jones' defense attorney neither requested a lesser-included-offense instruction at trial nor complained of its omission on direct appeal. See Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977). Our consideration of that argument is complicated by the Mississippi Supreme Court's failure to explain its denial of Jones' motion for collateral relief, in which this due process claim was unambiguously raised. While we are inclined to agree with the State, see O'Bryan v. Estelle, 714 F.2d 365 (5th Cir. 1983), cert. denied, ____ U.S. ____, 104 S.Ct. 1015, 79 L.Ed.2d 245 (1984), the contention is not jurisdictional and we choose to reject Jones' claim on its merits.

eliminated from the jury's consideration a non-capital "third option" by failing to instruct on s lesser-included offense. Under Alabama law, an intentional killing committed in the course of a robbery is a capital offense; intent to kill cannot be supplied by the felony-murder doctrine, however, and a killing during a robbery without that independent element of intent does not expose the accused to a death sentence. Nevertheless, the statute prohibited the judge from instructing on non-capital felony murder when the defendant was charged with intentional, or capital, murder. The jury was given the choice of either convicting the defendant of capital crime, in which case it was required to impose the death penalty, or of acquitting him. Id. at 628-29, 100 S.Ct. at 2385. This, the Supreme Court held, denied the jury a middle

ground and thereby introduced too great an element of chance in capital cases.

Beck is not implicated in this case. We noted in Bell v. Watkins, 692 F.2d 999 (5th Cir. 192), that Mississippi law offers nothing to parallel Alabama's lesser-included felony murder offense: "In Mississippi, no murder committed during the course of a robbery can be a simple murder." Bell, 692 F.2d at 1004-05 (citing Miss.Code Ann. § 97-3-19(2)(e) (Supp. 1982). Bell rejected the death-sentenced petitioner's claim that his Mississippi trial was flawed under Beck for lack of instructions on the lesser included offenses of simple murder or manslaughter: because there was no lesser charge available under Mississippi law, Beck imposed no due process duty to instruct on a lesser offense. Jones would expand Beck to require that Mississippi define an offense that might stand as a "third option" when the state

charges capital murder. The Supreme Court has now rejected that construction of Beck. Spaziano v. Florida, ____ U.S. ____, 104 S.Ct. 3154, 81 L.Ed.2d _____ (1984), held that Beck does not require instruction on a lesser included offense that was barred by a state statute of limitations: "Where no lesser included offense exists, a lesser included offense instruction detracts from rather than enhances, the rationality of the process. Beck does not require that result." After Spaziano, Beck can be read only to require instruction in capital cases on lesser included offenses available under state law. Mississippi defines no lesser included offense that might have applied to this robbery-killing, Bell, 692 F.2d at 1004-05, and the trial court in this case was therefore not bound by Beck to deliver a lesser included offense instruction.

IV

Jones was proven and found to have participated in a robbery during which the owner of the store was killed, but he was neither proven nor found to have done the killing or intended that it take place. Enmund's interpretation of the Eighth Amendment requires that we vacate Jones' death sentence, and the Double Jeopardy Clause prevents its reimposition. Jones has shown no constitutional infirmity in his conviction.

We therefore AFFIRM the judgment of the district court insofar as it denies relief as to Jones' conviction and insofar as it vacates Jones' death sentence. We REVERSE that judgment, however, insofar as it authorizes the State of Mississippi to hold another sentencing hearing at which Jones would again face a possible death sentence, and we REMAND with instructions to enter an order authorizing the

State to resentence Jones to a penalty less than death.

E. GRADY JOLLY, Circuit Judge, specially concurring:

I agree with the majority that Enmund v. Florida, 458 U.S. 782, 102 S.Ct. 3368, 3369, 73 L.Ed.2d 1140 (1982), and the Double Jeopardy Clause require us to grant Jones the relief he requests. I specially concur only to emphasize that our decision rests on the fact that the record before us contains absolutely no evidence that Jones himself "took life, attempted to take life, [or] intended to take life." Id. at 787, 102 S.Ct. at 3371.

The record in this case does not tell us what Jones and his accomplices separately or collectively intended to do when they drove to downtown Biloxi in December of 1974. It does not tell us what happened inside Art's Levis Store. It does not specify who supplied or

carried the weapon that was used to bludgeon Arthur Weinburger to death, and the weapon itself was not introduced at trial. This record does not tell us whether Jones or his accomplice did the actual killing. The state's case consists only of the testimony of several witnesses who observed Jones and his accomplice entering and departing the store, and the testimony of the witness who discovered

Weinburger's body inside the store immediately afterwards. Enmund undoubtedly, and unfortunately in this case, [1] requires more.

Had the state introduced any evidence that Jones killed or assisted his accomplice in killing Arthur Weinburger, or that he supplied the murder weapon, or even that he knew his

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1 Reddix, Jones's accomplice, stated in his confession that "Larry hit the man about three times with a Stilson wrench." Reddix v. Thigpen, 728 F.2d 705, n. 6 (5th Cir. 1984). The confession, however, was not admissible at Jones's trial. Enmund, compels the anomalous result that two can avoid a capital murder conviction where one could not. If Jones had been alone in this crime, we could, on the evidence against him in this record, uphold a capital murder conviction. If he had been alone the jury could have reasonably inferred that he took the life of Art Weinburger. From this record we cannot say whether it was he or his accomplice or both, and thus neither may receive the death sentence.

accomplice intended that a killing occur, we would reach a different result in this case. Without such evidence, however, we cannot ascribe the personal culpability to Jones that Enmund and the eighth amendment require before the state may sentence him to death.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

LARRY JONES — PLAINTIFF

VS. — CIVIL ACTION NO. S81-0109(R)

MORRIS THIGPEN, COMMISSIONER, MISSISSIPPI DEPARTMENT OF CORRECTIONS, ET AL. — DEFENDANTS

OPINION

I. BACKGROUND

On December 2, 1974, Arthur Weinberger was killed in his place of business in Biloxi, Mississippi. Three men, Willie Reddix, J. D. Reddix, and Larry Jones, were indicted for capital murder pursuant to MISS CODE ANN. § 97-3-19(2)(e) (1972). The indictment charged that these three men murdered Arthur Weinberger while they were engaged in the commission of a felony - armed robbery. Larry Jones entered a plea of not guilty to the indictment.

The case was called for trial in the Circuit Court of Harrison County and on March 19, 1975, Jones was found guilty of capital murder. He appealed to the Mississippi Supreme Court where the case was reversed and remanded with instructions to follow the procedure outlined in Jackson v. State, 337 So.2d 1242 (Miss. 1976). See Jones v. State, 342 So.2d 735 (Miss. 1977).

verdict of guilty to the crime of capital murder and on the following day, the same jury sentenced him to death by lethal gas.

On December 16, 1977, Jones filed a motion for a new trial; said motion was overruled and an appeal to the Mississippi Supreme Court was timely perfected. The court affirmed the conviction and sentence, Jones v. State, 381 So.2d 983 (Miss. 1980), and subsequently denied Jones' petition for rehearing.

Jones then filed a petition for writ of certiorari in the United States Supreme Court and on November 17, 1980, the petition was denied. Jones v. Mississippi, 449 U.S. 1003 (1980).

On March 3, 1981, Jones filed a motion for leave to file a petition for a writ of error coram nobis or habeas corpus in the Mississippi Supreme Court. On April 1, 1981, the petition was denied.

Thereafter, Jones filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254.

II. STANDARD OF REVIEW

28 U.S.C. § 2254 requires exhaustion of all state remedies. A federal court is barred from addressing claims in a habeas petition which were not the subject of timely objection under the state's procedural rules. Specifically, if a defendant is required by

state law to raise a timely challenge to a particular point and fails to do so he is barred from raising the claim in a federal habeas proceeding absent a showing of "cause" excusing his double procedural default and "actual prejudice" resulting from the errors of which he complains. Wainwright v. Sykes, 433 U.S. 28 (1977). See also Engle v. Issac, 50 wherein the court stated:

> The government next argues that consideration of the merits of Miller's federal claim is barred under Wainwright v. Sykes ... for failure to contemporaneously object and seek relief from the conduct of which he complains. We note, however, that the denial of habeas corpus relief at the state level was not based upon appellant's failure to timely object, but, rather, was a decision on the merits. It is well settled that a federal court is not barred from considering the merits of a ground for relief by reason of the fact that petitioner failed to make a contemporaneous objection, where the state courts did not rely upon the contemporaneous objection rule in denying relief.... This principle

> applies irrespective of how briefly or summarily the state court treats the merits of a petitioner's claim.

Id. (Footnote and citations omitted).

In the denial of petitioner's motion for leave to file a petition for writ of error coram nobis and/or writ of habeas corpus, the Mississippi Supreme Court's form entry on the minutes stated:

Jones contends that this summary denial was a decision on the merits and one in which the state supreme court did not rely upon the contemporaneous objection rule in denying his requested relief. Conversely, the state argues that this is not such a case. No findings of fact, conclusions of law, or any matters relative to the merits of the petition were considered by the supreme court. The state contends that Miller and the cases cited therein were cases where various state courts addressed a particular constitutional question

before it resulted in a waiver of the "waiver defense".

The Fifth Circuit has recently held that "failure to state whether a writ of coram nobis was denied on the merits or for procedural default creates a presumption that it was considered on the merits and does not bar federal habeas review." Bell v. Watkins, No. 81-4358, slip op. at 958 (5th Cir. Dec. 6, 1982). On the basis of Bell, the Court concludes that the supreme court did not rely upon state procedural grounds in denying the petitioner's requested relief and therefore, the Court is not precluded from reviewing the petitioner's claims.

A. Witherspoon Issues

During voir dire, four prospective veniremen indicated that they harbored conscientious scruples against the death penalty. These jurors were then questioned in

an effort to determine the extent of their opposition to the death penalty and to what degree it would influence them in any future deliberations. [1] Jones contends that he was

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[1] BY THE COURT: Ladies and gentlemen, the charge against the Defendant in this case is that of capital murder. You've been summonsed [sic] here as potential jurors on the charge. If the jury should find the verdict of guilty, a second hearing will be held to determine whether or not the Defendant should receive the sentence of death or life imprisonment. I therefore ask you, ladies and gentlemen, if any of you have any conscientious scruples against the infliction of the death penalty when the law authorizes it in proper case and where the death penalty warrants it. Special panel number one? Do any of you have conscientious scruples against the death penalty?
(To which there was no response.)
BY THE COURT: Number two?
(To which there was no response.)

(Footnote 1 Continued)

BY THE COURT: Regular panel number one? I think Mrs. Thorne, you indicated earlier - do I understand your earlier response to mean that you do have conscientious scruples against the infliction of the death penalty when the --
JUROR THORNE: -- I do.
BY THE COURT: Can you - since you have answered that you do have scruples, I ask you whether or not you can, nevertheless, follow the testimony of the witnesses and the instructions of the Court as to the law and returning a verdict of guilty, even though a verdict of guilty could potentially result in the death penalty, if you, being a judge of the evidence, are convinced of the guilt of the Defendant and the circumstances warrant such a verdict?
JUROR THORNE: I couldn't do it.
BY THE COURT: O. K., the law
WHEREUPON the Court continued to voir dire the jury panel, when the following transpired:
BY THE COURT: All right, Mrs. Thorne, in view of the responses from some of the other jurors, let me ask you to come forward and have a seat again.
(Mrs. Thorne was returned to the jury panel.)

(Footnote 1 Continued)

BY THE COURT: There appears to be some disagreement as to your response to the Court. We have, as I've indicated, two potential stages to this trial. One in which the jury decides whether or not this man is, in fact, guilty of the crime with which he is charged, which is capital murder. If the jury should find that he is, in fact, guilty of capital murder, a second stage of the trial must be held in which the jury decides whether or not the Defendant should suffer death or life imprisonment. As I understood - let me ask you at this time - you've indicated that you do have conscientious scruples against the death penalty. Would those conscientious scruples prevent you from fairly and objectively considering the evidence in the first stage, in determining whether or not the Defendant is guilty of capital murder?

JUROR THORNE: I think they would. I think my emotions would control my decision. think I could.

BY THE COURT: O. K., I'm satisfied and you will be excused, Mrs. Thorne. Thank you.

(Footnote 1 Continued)

BY MR. MORRIS: Your Honor, with all due respect, I'd like to make the same exception.
BY THE COURT: You may note an objection.

* * *

WHEREUPON the Court continued to voir dire the jury panel, during the course of which, the following transpired:
BY THE COURT: I think we had some other hands on that panel. Mrs. Breaux, I think you --
JUROR BREAUX: -- I don't think I could - I could actually say one way or the other. I wouldn't do any good because I wouldn't be able to make any decision whether he is or isn't guilty.
BY THE COURT: You could not decide whether or not he is guilty?
JUROR BREAUX: No, sir. No, sir.
BY THE COURT: Is that what you are saying because I --
JUROR BREAUX: -- I don't think I could make that decision, whether he is or isn't guilty of what they say he's done.
BY THE COURT: All Right, simply the fact that you, in the second hearing, can determine whether or not the death penalty or life imprisonment would be inflicted would prevent you from

(Footnote 1 Continued)

objectively making the decision in the first hearing, as to guilt?
JUROR BREAUX: I couldn't make it.
BY THE COURT: O. K., the law would require that I excuse you, Mrs. Breaux. Thank you. Were there any other hands on jury number one of the regular panel? I see a rather uncertain hand, Mrs. Hover. Are you scratching your ear or are you raising your hand?
JUROR HOVER: I don't know that I could, either. I mean I just wouldn't want to feel like that, you know, somebody's in prison or - or would be committed to an institution, I mean, because I said yes or no.
BY THE COURT: Well, nobody's here to tell you that the decision in this case won't be a grave and difficult one. I think we all understand that. I think we have to keep the two questions in perspective. The first question, Mrs. Hover, is do you have any conscientious scruples against the infliction of the death penalty?
JUROR HOVER: I don't but I mean, I don't know that I would vote for it. I mean, you know, if somebody else committed somebody else to a sentence, it wouldn't bother me, but I mean, for me to do it, I just have

(Footnote 1 Continued)

BY THE COURT: Well, the next question is - keeping in mind the way that you feel, would your feelings prevent you from fairly and objectively determining from the evidence and the law whether or not the Defendant is guilty of capital murder or a lesser crime?
JUROR HOVER: I've got to - I don't think I could do it. I wouldn't want to do it.
BY THE COURT: None of us want to make a grave decision like that but would your feelings prevent you from being fair and to be on it. I mean, you want me to be honest, too, so ...
BY THE COURT: I think it's necessary. We appreciate what you are telling us right now. It's informative but the question that I have to ask you is one that the law requires and I am certain the parties are going to consider what you are telling us right now, but in order for the law - to require me to excuse you, you would have to tell me that you cannot fairly and impartially consider the question of whether or not the Defendant is guilty of capital murder or another crime because you have scruples against the death penalty.
JUROR HOVER: Well, I just - I'd have to say, yes, then. I'd

(Footnote 1 Continued)

have scruples against the punishment.
BY THE COURT: All Right, I'll have to excuse you. Thank you for being candid. Mr. Kornman?
JUROR KORNMAN: I don't believe I could inflict the death penalty, either.
BY THE COURT: I am going to ask you another question. You told me that you cannot inflict the death penalty. Would that fact prevent you from fairly and objectively determining whether or not the Defendant is guilty of capital murder or a lesser crime?
JUROR KORNMAN: Yes, I think it would.
BY THE COURT: You feel like, you, sir. Thank you.
BY MR. MORRIS: Your Honor, I want to - if I may, just have a continuing - for the record - exception, for purposes of what we discussed.
BY THE COURT: All right.

TR. Vol. 1, p. 160-66.

denied his right to a fair and impartial jury under the sixth and fourteenth amendments as construed and applied in Witherspoon v. Illinois, 391 U.S. 510 (1968), by the exclusion of these four veniremen.

Through Witherspoon and its progeny, the Court has established that a juror may not be challenged for cause based upon his general objections to capital punishment. However, a venireman may constitutionally be excluded if: (1) he would automatically vote against the death penalty regardless of the facts adduced at trial; or (2) his attitude toward the death penalty would prevent him from making an impartial decision as to the defendant's guilt. Witherspoon v. Illinois, 391 U.S. at 522-23 n.21; Adams v. Texas, 448 U.S. 38 45 (1980). Further, the Witherspoon test is two pronged; there is no requirement that both prongs be met prior to exclusion from a

venire. Williams v. Maggio, 679 F.2d 381, 384 (5th Cir. 1982).

In analyzing the excluded jurors' responses, Juror Thorne stated unequivocally that her scruples against the death penalty would prevent her from objectively considering the question of the defendant's guilt. This response meets the second criteria adduced in Witherspoon and the Court concludes that Juror Thorne was properly excluded.

Likewise, Juror Breaux stated unequivocally that her ability to render a verdict as to guilt would be directly affected by the knowledge that this verdict could result in the imposition of the death penalty. To this end, Juror Breaux was properly excused.

Jurors Hover and Kornman stated that they could not inflict the death penalty. These personal convictions made them ineligible to

serve on a capital jury, and accordingly, they were properly excused.

B. Refusal of Jury's Verdict

During the sentencing phase and after the jury deliberated for over two hours, a note was sent to the court which stated that "We the jury cannot come to a unanimously [sic] decision -- what shall we do?", [2] The judge, in response, stated "Ladies and Gentlemen ... it's been a long day ... and it's getting a little bit late into the night so ... Court is going to recess until 9 tomorrow morning." [3] Jones contends that the judge should have imposed a life sentence pursuant to the provisions of MISS. CODE ANN. § 99-19-103 (Supp. 1982).

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2 TR. Vol. 4, p. 743

3 TR. Vol. 4, p. 741, 742

MISS. CODE ANN. § 99-19-103 (Supp. 1982) states that if the jury cannot agree, within a reasonable time, as to punishment, the judge shall dismiss the jury and impose a life sentence. § 99-19-103, however, authorizes the trial judge to return the jury for further deliberation if he thinks it likely that a verdict may be reached. Sharplin v. State, 330 So.2d 591, 596 (Miss. 1976).

A similar incident occurred in Jordan v. State, 365 So.2d 1198, 1206 (Miss. 1978), when the jury came into court and announced that they could not agree as to punishment. The judge directed that they deliberate further. The Mississippi Supreme Court held that no error had occurred since the jurors had not announced that they could not reach a verdict if given additional time.

In the case sub judice, the jury simply requested further instruction. They did not

indicate that they were hopelessly deadlocked, and the trial court properly used its discretion in recessing for the night after a long day. As the state supreme court concluded, "[w]e do not consider the note to be the equivalent of a verdict and therefore conclude this assignment lacks merit." 381 So.2d at 992.

C. Failure to Instruct on a Lesser Included Offense

At the conclusion of the guilt phase of Jones' trial, the only offense submitted to the jury was that of capital murder. Jones argues that the fourteenth amendment was violated because the jury was not permitted to consider a lesser included offense. The state argues that Jones is barred from raising this issue on habeas due to his failure to contemporaneously request such an instruction.

The Mississippi Supreme Court has explicitly held that "the trial judge shall not be put in error for his failure to instruct on any point of law unless specifically requested in writing to do so." Newell v. State, 308 So.2d 71, 78 (Miss. 1975). However, the Fifth Circuit has interpreted the Mississippi Supreme Court's opinion in Culberson v. State, 379 So.2d 499 (Miss. 1980), cert. denied, 449 U.S. 1103 (1981), as expressly waiving Mississippi Supreme Court Rule 42's contemporaneous objection requirement in capital cases. Bell v. Watkins, No. 81-4358, slip op. at 955 n.5 (5th Cir. Dec. 6, 1982). Therefore, no procedural bar exists which precludes the Court from reviewing the petitioner's claim.

In Beck v. Alabama, 447 U.S. 625 (1980), the Court held that a lesser included offense instruction should be given if the evidence would permit a jury rationally to find the

defendant guilty of the lesser offense and acquit him of the greater. The Court has since emphasized that there is no due process violation unless there is some evidence to murder as a killing "done with or without design to effect death, by any person engaged in the commission of the crime of ... robbery ...." Thus, any murder committed during the course of a robbery is capital murder. Since it was proved by the state that Jones committed a robbery, any murder committed had to be capital. See Bell v. Watkins, No. 81-4358, slip op. at 955-57 (5th Cir. Dec. 6, 1982). Therefore, the trial court's failure to give a lesser included offense instruction was proper.

D. Jones' Death Sentence Is Excessive and Unconstitutional

The petitioner challenges the imposition of the death sentence in his case on the basis

of the recent decision of Enmund v. Florida, 50 U.S.L.W. 5087 (U.S. July 2, 1982).

In Enmund, an aged couple was murdered during the commission of a robbery. Enmund and two others were indicted for the first-degree murder and robbery of the couple. The jury found Enmund and a co-defendant guilty and in the sentencing hearing recommended the death penalty for both defendants. On appeal, the Florida Supreme Court held that the record supported no more than an inference that Enmund was the person driving the getaway car, waiting in the car on the side of the road to help the robbers escape. Under Florida law, this made Enmund a constructive aider and abettor and therefore, a principal in first-degree murder upon whom the death penalty could be imposed. This fact alone supported the verdict of murder in the first-degree under Florida's felony murder statute.

The Supreme Court reasoned that while robbery is a serious crime, it is not a crime "so grievous an affront to humanity that the 'individualized consideration as a constitutional requirement in imposing the death sentence.'" Id. at 5091 (quoting Lockett v. Ohio, 438 U.S. 586, 605 (1978)). [4] The Court held that the imposition of the death penalty is cruel and unusual punishment under the eighth amendment in the absence of proof that the defendant killed, attempted to kill, or intended to kill.

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[4] The Court noted that of the thirty-six state and federal jurisdictions presently authorizing the death penalty, only nine jurisdictions authorize imposition of the death penalty solely for participation in a robbery in which another robber takes life. Mississippi is one of those nine. See MISS. CODE ANN. §§ 97-3-19(2)(e), 99-19-105(5) (Supp. 1982).

In applying Enmund to the case sub judice, the Court finds that the petitioner's death sentence must be vacated. There is nothing in the verdict of the jury that evidences a finding that Larry Jones killed, attempted to kill, or intended to kill the deceased. The Mississippi Supreme Court recognized this absence and stated:

> Appellant next contends, "The record does not expressly show that this appellant was actively engaged in an assault on the victim in the course of the robbery set out by all the evidence in the indictment alleges that Larry Jones, together with his co-indictees Willie Reddix and J.D. Reddix, participated in an armed robbery which resulted in the death of Arthur Weinburger [sic], a human being. The statutory subsection proscribing appellant's conduct, Mississippi Code Annotated section 97-3-19(2)(e) (1972), appears in the indictment. It designates as capital murder a killing "done with or without any design to effect death, by any person engaged in the commission of the crime of . . . robbery.

> This language renders the factual question of which of two co-felons acted as the efficient cause of the death unnecessary to the verdict in the guilt-determining phase. It is enough that the evidence shows the willing participation of the accused in a robbery in furtherance of which a death resulted. See Price v. State, 362 So.2d 204 (Miss. 1978); McNeer v. State, 228 Miss. 308, 87 So.2d 568 (1956); Carrol v. State, 183 Miss. 1, 183 So. 703 (1938); Woodward v. State, 166 Miss. 596, murder in the absence of proof that he had a specific intention to kill.

Jones v. State, 381 So.2d 983, 989 (Miss. 1980). Further evidencing such an absence is a statement made by Chief Justice Patterson in reference to the prosecutor's statement in closing argument that Arthur Weinberger was hit four times with a wrench, "I think it had the likelihood of leading the jury into the belief that the appellant struck the blows when there is no evidence in this record establishing that fact." 381 So.2d at 999 (Patterson, J., dissenting).

The state argues that Enmund, in effect, establishes a proximity rule and that the factual setting of Enmund fits the role of J. D. Reddix, the driver of the getaway car, and not that of Larry Jones, who was in the store with the other robber. This Court must reject this argument in favor of the conclusion that the issue is intent and not physical proximity.

Therefore, in the in the [sic] absence of a finding by the jury that Larry Jones killed,

attempted to kill, or intended to kill, the Court finds that the sentence of death violates the eighth amendment. [5]

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[5] It is not the intent of this Court that the jury's verdict of guilty to the actual crime of felony murder be set aside. It is this Court's opinion that in order to be convicted of felony murder under § 97-3-19(2)(e), the state need show only that the defendant was guilty of a robbery during which a killing was committed. However, Enmund prohibits the infliction of Enmund are no longer applicable. To this end, only when the state has presented evidence, and the jury has found that the defendant killed, attempted to kill, or intended to kill, may the state inflict the penalty of death.

While the Court is not directing that the Enmund factors be shown during the sentencing phase of the defendant's trial, it seems appropriate for the jury to address these elements during the deliberations relative to aggravating and mitigating circumstances.

E. Ineffective Assistance of Counsel During Sentencing Phase

Jones claims that his counsel was ineffective during the sentencing phase of his trial because no evidence of any mitigating circumstances was presented bv his attorney. Jones claims that evidence of his subnormal intelligence should have been presented to the jury in mitigation of his sentence. While the defendant Jones did give a closing statement to the jury, his attorney presented nothing. [6]

In Voyles v. Watkins, 489 F.Supp. 901 (N.D. Miss. 1980), the court was faced with a similar lack of presentation by defense counsel during the sentencing phase of the trial. The court responded:

> As stated, petitioner's trial counsel failed to present any evidence of mitigating

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6 TR. Vol. 4, p. 720.

circumstances, although an array of witnesses to testify in mitigation would have been readily available upon proper investigation. An appeal to spare the petitioner's life could have been forcefully made through diligent efforts of his trial counsel. Instead, the entire defense at sentencing consisted of the following "argument" by counsel:

> The defendant also submits the portion of the trial to you on the record as you now have it. The last instruction that the Court read has various circumstances in it called aggravating and mitigating. It is up to you to take all those, apply them to what you have heard, the testimony that is now in the record and to find whether any of those apply. I suppose the bottom line of this is you have to decide whether the imposition of the penalty of death upon Jimmy Voyles will benefit our society and serve the ends of justice. I think it will not. Thank you. (TR. 57-59).

We are thus faced with a situation where the defense attorney "put on what amounted to no defense at all," thereby making any showing of prejudice unnecessary. See

> Davis v. Alabama, supra, at 1221-22. However, we unhesitatingly believe that this lack of defense, at such a critical stage, due to ineffectiveness of rights to effective assistance of counsel and due process.

Id. at 912.

While effective assistance of counsel is not errorless counsel, counsel must perform services that are reasonably adequate. Herring v. Estelle, 491 F.2d 125, 127 (5th Cir. 1974). Counsel is ineffective "if he fails to investigate sources of evidence which may be helpful to the defense." Davis v. Alabama, 596 F.2d 1214, 1217 (5th Cir.), vacated as moot, 446 U.S. 903 (1980).

In the present case, the petitioner's attorney offered no evidence in mitigation of the death sentence at the sentencing phase of petitioner's trial. After the prosecution rested, petitioner's attorney simply stated

"The defense rests, your Honor." TR. Vol. 4, p. 720.

Evidence that the petitioner possessed subnormal intelligence was expressed in the testimony of Dr. Gilbert S. MacVaugh, a licensed clinical psychologist and witness on behalf of the petitioner at the hearing on this matter. Dr. MacVaugh testified that he administered the Weschler Adult Intelligence Scale (WAIS) and the results revealed that Jones had a verbal intelligence quotient (IQ) of 49, a performance IQ of 35, and a full scale IQ of 41. Dr. MacVaugh concluded that functionally, Jones was a mild mental retard. [7] during the sentencing phase of the petitioner's trial. The competence of the petitioner at the

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7 The respondent offered the testimony of Dr. Glen Anderson, director of the forensic unit at the Mississippi State Mental Hospital at Whitfield. Dr. Anderson indicated that Jones

time of the crime was a matter for the jury to consider in reaching a decision on the petitioner's sentence. Accordingly, this factor should have been presented to the jury.

The Court is therefore of the opinion that the sentencing phase of the trial must be set aside as a result of ineffective assistance of counsel. While the state argues that this claim has been waived by lack of exhaustion, the Court finds that sufficient "cause" exists for this Court to excuse the prior lack of presentation. Furthermore, the "prejudice" that flows from this lack of defense is obvious. This Court, however, need not make this determination under the authority of Voyles.

III. CONCLUSION

We therefore conclude that the petitioner is entitled to relief upon his petition for habeas corpus insofar as his sentence of death

is affected. The Court holds that the sentence of death must be vacated due to the following errors of constitutional dimension: (1) imposition of the death sentence in violation of the eighth amendment under standards set forth by Enmund v. Florida [8] and (2)

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8 The petitioner contends that he is permanently insulated from the imposition of the death penalty by virtue of the Double Jeopardy Clause. He argues that should the Court vacate his sentence on the basis of Enmund, In Tibbs the Supreme Court clarified the issue of when a defendant whose conviction has been reversed may be retried without offending the Double Jeopardy Clause. The Court held that when a reversal is predicated upon the prosecution's failure to produce sufficient evidence to prove its case, i.e., insufficiency of the evidence, the Double Jeopardy Clause bars a retrial. However, where an appellate court sits as

(Footnote 8 Continued)

a "thirteenth juror" and disagrees with the jury's resolution of conflicting evidence, i.e., a reversal based on the weight of the evidence, a retrial is not precluded by the Double Jeopardy Clause. Tibbs v. Florida, 50 U.S.L.W. at 4609-10.

In this case at bar, there is evidence in the record from which a jury could determine the petitioner's individual culpability. There is testimony to the effect that there was blood on a pair of combat boots Jones was wearing, and evidence that Jones was physically present in the business establisment where the murder occurred. This, of course, is necessary to obtain a conviction for felony murder. However, no determination of the weight to be given to such evidence was made by the jury. Under Enmund, this should have been considered.

ineffective assistant of counsel during the sentencing phase of the petitioner's trial. This renders it unnecessary for the Court to pass upon other errors of law asserted by petitioner.

An order in accordance with the opinion of this Court shall be submitted as provided by the local rules. This the 27th day of January, 1983.

DAN M. RUSSELL, JR.

UNITED STATES DISTRICT JUDGE

IN THE SUPREME COURT OF MISSISSIPPI

NO. 50,944

LARRY JONES

V.

STATE OF MISSISSIPPI

EN BANC.

PATTERSON, CHIEF JUSTICE, FOR THE COURT ON THE GUILT-DETERMINING PHASE.

WALKER, J., FOR THE COURT ON THE SENTENCE-DETERMINING PHASE.

Larry Jones appeals from a second conviction of capital murder and sentence of death entered in the Circuit Court of the Second Judicial District of Harrison County.

We reversed Jones' first conviction and death sentence in Jones v. State, 342 So.2d 735 (Miss. 1977), and directed a new trial

following Jackson v. State, 337 So.2d 1242 (Miss. 1976).

THE GUILT PHASE OF TRIAL

The state's case centers upon the testimony of J. D. Reddix, hereinafter J.D., who testified that on the morning of December 2, 1974, his brother Willie Reddix, hereinafter Willie, and Larry Jones persuaded him to drive them to downtown Biloxi. J. D. testified that at the time he had no knowledge of any criminal design of the others. After stopping for gas, J. D. proceeded with Willie and Larry Jones, hereinafter Jones, to downtown Biloxi where he parked his gray Cadillac in the parking lot of a show store. J. D. testified Willie and Jones then left walking in the general direction of Weinburger's store while he remained in the car. J. D. recalled that Jones at the time was wearing a pair of combat boots.

Orvell McGee was in the same downtown area on December 2, 1974. After identifying a photograph of J. D.'s car, he testified that at about 11:15 a.m. he saw one man park the car and two others get out of it and walk in the direction of Weinburger's store. McGee observed that one of the persons leaving the car wore combat boots. Shortly thereafter, he saw them return and noted the person wearing combat boots was carrying a footlocker. He could not identify Jones as one of the two men he saw leave and later return to the car.

Shortly before noon on December 2, 1974, Ray Real, a store manager, observed a man carrying a footlocker away from Weinburger's store. At about this time Preston Sullivan testified he entered the store and found Arthur Weinburger, proprietor, lying in an office doorway amid a pool of blood. A surgeon gave

evidence that Weinburger died later in the day as the result of blows to his head.

J. D. stated that Jones was carrying a footlocker when he returned to the car. A state witness, Lula Mae Bell, aunt of J. D. and Willie, at first testified she could not remember having seen her nephews or Jones in downtown Biloxi on the day of the homicide. However, on direct examination the following day she recanted, admitting that she had "lied" earlier in her testimony, and explained by stating her life had been threatened in the interest of Jones. She then testified that she did see Willie and Jones leave J. D.'s car and walk toward Weinburger's store on the day of the homicide and that Jones was wearing combat boots.

Annie Lee Reddix, mother of Willie and J. D., testified that on December 2, 1974, J. D., Willie and Jones left her house in J. D.'s

car. When they returned, Jones stored the footlocker which he had in her house, changed the combat boots he was wearing to tennis shoes, and later departed, leaving the boots.

On December 3, 1974, pursuant to warrant, detectives searched the house of Annie Lee Reddix. They discovered a footlocker and a pair of combat boots. The footlocker was identified as the one taken from Weinburger's store, and the boots were found to be stained with human blood of an undeterminable type. Lerline Blancq, manager of Weinburger's store, testified that approximately $600 had been taken in the robbery and positively identified the merchandise found in the footlocker as belonging to Weinburger's store.

By his first, second, and sixth assignments of error, Jones raises the sufficiency of the evidence to support the jury's guilty verdict. He argues that only two

witnesses, Lula Mae Bell, an admitted perjurer, and J. D. Reddix, an admitted accomplice, linked him to the crime.

We conclude the state presented circumstantial evidence sufficient to support the jury verdict of guilty. Under our authorities Lula Mae Bell's and J. D. Reddix's testimony is competent.

Lula Mae Bell was presumptively innocent of perjury when she testified and was therefore a competent witness. Isonhood v. State, 274 So.2d 685, 690 (Miss. 1973). As for J. D. Reddix, his status as an accomplice affected the weight, not the competency of his testimony. Thomas v. State, 340 So.2d 1 (Miss. 1976); Black v. State, 336 So.2d 1302 (Miss. 1976); Fleming v. State, 319 So.2d 2223 (Miss. 1975). The jury had before it exhaustive attempts by the defense to impeach these witnesses and by the state to

rehabilitate them. The trial court, in our opinion, properly left to the jury the weight and worth to be accorded their testimony. From the entirety of the record and particularly in view of the corroborating circumstances evidenced by disinterested witnesses, we think that reasonable minds could have found it to have been beyond reasonable doubt that Jones participated in the robbery resulting in Weinburger's death.

As a confessed accessory after the fact to the murder with which Jones was charged, J. D. was an accomplice. Dedeaux v. State, 125 Miss. 326, 87 So. 664 (1921). Therefore, his testimony must be considered with caution. Feranda v. State, 267 So.2d 305 (Miss. 1972). However, it is also established that an accused may be convicted on the uncorroborated testimony of an accomplice. Rich v. State, 322 So.2d 468 (Miss. 1975); Moore v. State, 291

So.2d 187 (Miss. 1974); Young v. State, 212 Miss. 460, 54 So.2d 671 (1951). Moreover, J. D.'s testimony appears consistent with the corroborating testimony to which other witnesses testified.

State witnesses Orvel McGee, Ray Real, Preston Sullivan, Lerline Blancq, and others, together established that at about midday on the day of the homicide, two empty-handed black men, one wearing combat boots, went in the direction of Weinburger's store from J. D.'s parked automobile. Orvel McGee recalled seeing a man wearing combat boots return with a footlocker to the car a few minutes after he left it. Later a footlocker was carried by Jones into Annie Lee Reddix's house, where it was subsequently discovered and identified as stolen from Weinburger's store, and bloodstained boots were also found. In sum, the record contains more than "slight"

corroborative evidence which we held sufficient to sustain the conviction on an accomplice's testimony in Lifer v. State, 189 Miss. 754, 199 So. 107 (1940), and cases cited therein.

On cross-examination of J. D., an inconsistency was established between his current testimony concerning the color of the pants worn by Jones on the day of the homicide and his testimony on the same matter given at a previous hearing. J. D. acknowledged the inconsistency, but offered no explanation. An additional inconsistency was brought out on cross-examination. J. D. had apparently told the Biloxi police that one "Royce" was with them on the day of the homicide, but the evidence was inconclusive as to whether "Royce" or "Roy," [1] as he was later referred to,

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[1] Again referred to in the sentencing phase by Jones in his pro se argument.

accompanied the participants in the crime to the downtown area.

We do not think the cross-examination concerning the color of the pants worn by Larry Jones and the company of Ray destroyed J. D.'s testimony as a matter of law. The jury has the duty to determine the impeachment value of inconsistencies or contradictions as well as testimonial defects of perception, memory and sincerity. The entire sequence of examination suggests that while Roy may have been "with them" sometime on December 2, 1974, he did not accompany the criminal participants to downtown Biloxi. Under the circumstances, we think leaving the question of credibility to the jury was proper and that appellant's conviction cannot be said to be contrary to the weight of the evidence. See Kinney v. State, 336 So.2d 493 (Miss. 1976); Black v. State, 336 So.2d 1302 (Miss. 1976); Fleming v. State, 319 So.2d

223 (Miss. 1975); Null v. State, 311 So.2d 654 (Miss. 1975).

Appellant next contends, "The record does not expressly show that this appellant was actively engaged in an assault on the victim in the course of the robbery set out by all the evidence in the record." We agree the record does not conclusively establish which of the two co-felons, Willie Reddix or Larry Jones, the appellant, actually wielded the blows causing Weinburger's death. However, doubt concerning the precise role of the appellant in the homicide does not upset the jury's verdict. The indictment alleges that Larry Jones, together with his co-indictees Willie Reddix and J. D. Reddix, participated in an armed robbery which resulted in the death of Arthur Weinburger, a human being. The statutory subsection proscribing appellant's conduct, Mississippi Code Annotated section

97-3-19(2)(e) (1972), appears in the indictment. It designates as capital murder a killing "done with or without any design to effect death, by any person engaged in the commission of the crime of . . . robbery . . .."

This language renders the factual question of which of two co-felons acted as the efficient cause of the death unnecessary to the verdict in the guilt-determining phase. It is enough that the evidence shows the willing participation of the accused in a robbery in furtherance of which a death resulted. See Price v. State, 362 So.2d 204 (Miss. 1978); McNeer v. State, 228 Miss. 308, 87 So.2d 568 (1956); Carrol v. State, 183 Miss. 1, 183 So. 703 (1938); Woodward v. State, 166 Miss. 596, 143 So. 859 (1932); Fisher v. State, 150 Miss. 206, 116 So. 746 (1928); cf. Miss. Code Ann. § 97-1-3 (1972).

As we have said, the evidence sufficiently demonstrates such a willing participation by the appellant. He does not challenge the indictment, nor suggest the legislature lacks the power to expose him to guilt of capital murder in the absence of proof that he had a specific intention to kill. We conclude that the verdict in the guilt-determining phase is within the law and the weight of the evidence.

Appellant next contends the cumulative effect of trial errors consisting of unduly constrained voir dire examination, unduly restricted defense argument and improper prosecutorial remarks requires reversal.

The trial court has broad discretion in passing upon the extent and propriety of questions addressed to prospective jurors. Myers v. State, 268 So.2d 353 (Miss. 1972). Although broad, the discretion is not unlimited, and an abuse will be found on appeal

where clear prejudice to the accused results from undue constraint on the defense or undue lack of constraint on the prosecution. See, e.g., McCaskill v. State, 227 So.2d 847 (Miss. 1969), Leverett v. State, 112 Miss. 394, 73 So. 273 (1916).

Appellant complains that the trial court did not permit him to inquire of the prospective jurors whether they would be happy to be tried by persons in their frame of mind. Yet our review reveals the trial court, for whatever reason, did permit this questioning. Further, appellant suggests he was not permitted to ask the prospective jurors whether they would follow the law. Again, the record does not support the suggestion, and we must conclude neither contention has merit.

Appellant next argues that undue restraint was imposed upon defense counsel when he attempted to ask the prospective jurors whether

they would consider the indictment as anything but a "mere piece of paper" in considering their verdict. At this point the court advised defense counsel that he would instruct on this point and the record reveals that he did so at the appropriate time.

A review of the objections which were sustained to defense counsel's closing summation in the guilt-determining phase reveals no error, in our opinion. The court properly sustained an objection to defense counsel's attempt to place the individual jurors in the non-neutral position of the accused. See Danner v. Mid-State Paving Co., 252 Miss. 776, 173 So.2d 608 (1965).

The state also objected to defense counsel's statement, "[b]ear with me also because the state is going to try to confuse me as much as they can . . .." The court sustained the objection to this argument and we

think properly so. Later in defense counsel's argument, the court sustained an objection raised when counsel suggested to the jury that one of the state's witnesses had been granted immunity from perjury. Again, the trial court's ruling appears to have been correct, because there is no suggestion in the record that there had been a grant of immunity. One well established constraint upon the permissible perimeters of closing argument is that counsel must limit his remarks to the evidence presented. See Gray v. State, 351 So.2d 1342 (Miss. 1977); Nelms and Blums v. Fink, 159 Miss. 372, 131 So. 817 (1930).

Appellant next contends that the cumulative effect of objectionable statements made by the state vitiated his trial with prejudicial error. Appellant's complain concerns testimony and statements which touched upon the unpleasant details of Weinburger's

death. Again, reviewing the record, we find the trial court sustained defense counsel's objections to any detail relating to the physical aspects of the death when questioning exceeded that necessary to establish the fact and cause of death. For example, the trial court refused to admit pictures of the deceased during the guilt phase and instructed the jury to disregard the state's dim suggestions that the killing was particularly atrocious.

Appellant also complains that the jury learned of Willie Reddix's conviction in a separate trial. It is true that we have held admission of evidence of this nature to be inimical to a fair trial. Ivy v. State, 301 So.2d 292 (Miss. 1974); McCray v. State, 293 So.2d 807 (Miss. 1974); Buckley v. State, 223 So.2d 524 (Miss. 1969); State v. Thornhill, 251 Miss. 718, 171 So.2d 308 (1965). However, we find that defense counsel underscored Willie

Reddix's conviction and attempted to use that fact to appellant's advantage, as can be seen from the following colloquy between defense counsel and state witness Annie Lee Reddix:

> Q. You do have a real good motive in shifting the blame in this case from your son J. D. to Larry Jones haven't you?
>
> * * * *
>
> A. I don't know the reason you are talking about.
>
> Q. Well, J. D. is your son, isn't he?
>
> A. Yes, he's my son.
>
> Q. J. D. was charged with capital murder, wasn't he?
>
> A. All three of them was charged with capital murder.
>
> Q. That's right, and Willie's been convicted hasn't he?
>
> A. Yes.
>
> Q. And sent to the gas chamber.
>
> A. Yes.

Also, defense counsel while cross-examining J. D. Reddix, elicited the following testimony:

> Q. Were you or were you not a codefendant in this case in the beginning?
>
> A. Would you -- what --
>
> Q. -- Weren't you charged and indicted for the crime of capital murder?
>
> A. Yes, I was.

We think an appellant cannot assail as prejudicial his own trial tactics, because it would foster a propensity in litigants to create error to enhance the possibility of reversal and repeated trials. This he is not permitted to do. Simpson v. State, 366 So.2d 1085 (Miss. 1979).

Appellant then argues his motion for a mistrial was improperly denied, because

irreparable prejudice resulted from the following:

> BY MR. NECAISE: And then finding this Defendant along with the co-defendant, Willie Reddix, in Jackson County four days later and this Defendant doing --
>
> BY MR. MORRIS: -- objection, Your Honor. There is no evidence whatsoever before this Court that this Defendant was found with Willie Reddix.
>
> BY THE COURT: Objection sustained.

The court's ruling sufficed to repair any prejudice which might otherwise have resulted. It negated, we think, any suggestion of guilt by association.

In conclusion, we are of the opinion that when considered either alone or in combination, appellant's third, fourth, and twelfth assignments of error do not merit reversal of the verdict rendered in the guilt-determining phase.

By his seventh assignment of error, Jones contends the court erred in refusing Instructions D-4, D-5, D-8, D-9, D-10, D-12, D-16, D-17, D-18 and D-19. We have studiously reviewed these instructions and are of the opinion they are in all essential respects cumulative with others which were granted. The trial court is not required to grant several instructions on the same question in a different verbiage. McMillon v. State, 198 Miss. 179, 21 So.2d 586 (1945). When we consider all of the instructions together, we conclude the jury was properly instructed upon the law of the case.

Instruction D-17 concerns the weight to be accorded the testimony of an accomplice. While it would not be improper to grant an instruction of this nature, Dedeaux v. State, 125 Miss. 326, 87 So. 664 (1921), the decision to grant or refuse it

rests within the sound discretion of the trial court. Ragan v. State, 318 So.2d 879 (Miss. 1975); Wellborn v. State, 140 Miss. 640, 105 So. 769 (1925). Moreover, the instruction refers to "the unsupported testimony of an alleged codefendant." This suggests the testimony of the accomplice was unsupported by other evidence when in fact it was corroborated. We therefore think refusal of Instruction D-17 does not constitute reversible error.

Our review of the record reveals no prejudicial error. We therefore affirm the verdict of guilty.

AFFIRMED.
ALL JUSTICES CONCUR.

THE SENTENCING PHASE OF TRIAL

WALKER, J., FOR THE COURT:

The appellant contends there was error in dismissing jurors who were opposed to the death penalty. The relevant portions of the voir dire examination lead us to conclude this assignment has no merit.

On appellant's appeal from his first conviction of capital murder, this Court in directing a retrial in accord with Jackson, supra, stated: "On retrial, if defendant is tried on a capital charge, the trial court will follow Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968)." 342 So.2d at 737. The lower court complied with this directive by eliminating for cause those jurors who not only indicated they harbored conscientious scruples against the death penalty, but who also indicated those scruples

would prevent them from trying the issue of guilt in accord with their oath. Those who harbored conscientious scruples but who signified they could follow the law and fairly try the case were retained as prospective jurors. This complied with Witherspoon, supra. See also Spinkellink v. Wainwright, 578 F.2d 582, 592-93 (5th Cir. 1978).

Appellant next contends the death penalty statute, Mississippi Code Annotated section 99-19-101 (Supp. 1978), is unconstitutionally vague. He argues that no valid death penalty statute existed in this state at the time of the crime. We have rejected identical contentions in earlier opinions and think it unnecessary to reiterate the discussions contained in them. See Washington v. State, 361 So.2d 61 (Miss. 1978); Irving v. State, 361 So.2d 1360 (Miss. 1978); Bell v. State, 353

So.2d 1141 (Miss. 1977); and Jackson v. State, 337 So.2d 1242 (Miss. 1976).

Jones next argues there was error in Instruction C-30 concerning the form of the verdict. The alleged defect in the instruction consists of the omission of a statement informing the jurors in the event of their inability to reach a unanimous verdict a life sentence would be imposed. We note that Rule 5.13 of the Mississippi Uniform Criminal Rules of Circuit Court Practice provides for such a statement in the sentencing phase of a capital case, however, the omission has not been held reversible error. We have held only that "[i]f the jury is unable to agree unanimously on a verdict at the sentencing hearing, the defendant shall be sentenced to life in prison." Jackson v. State, 337 So.2d 1242, 1256 (Miss. 1976).

We do not find an instruction requested by appellant concerning the form of the verdict. But assuming, arguendo, that appellant preserved for review the issue raised by his eighth assignment of error, see McMullen v. State, 291 So.2d 537 (Miss. 1974), we are of the opinion that the omission does not constitute reversible error, because the jury did reach a unanimous verdict within a reasonable time.

This brings us to the argument that a life sentence should have been entered when the jury after deliberating for two hours and fifteen minutes, returned to the courtroom at 9:15 p.m. with a note, signed by the foreman, reading, "[w]e the jury cannot come to a unanimously [sic] decision--what shall we do?" The construction of this note becomes, as appellant suggests, crucial under Jackson, supra. If interpreted as a statement by the

jurors that they could not within a reasonable time reach unanimity, the death sentence imposed the following day is in jeopardy. If, however, it is construed as a statement by the jurors that they were weary and desired a recess, the death sentence eventually imposed is valid, subject only to judicial review pursuant to Mississippi Code Annotated section 99-19-105 (Supp. 1978).

When the note was received the trial judge stated: "Ladies and gentlemen of the jury, it's been a long day. You started work this morning at about nine and it's getting a little bit late into the night so at this time, court is going to recess until nine tomorrow morning." In so stating, he complied with this Court's decisions concerning the procedure to be followed when the jury indicates its present inability to reach a unanimous verdict. See, e.g., Jordan v. State, 365 So.2d

1198, 1206 (Miss. 1978), and cases cited therein. We do not consider the note to be the equivalent of a verdict and therefore conclude this assignment lacks merit.

Some of the Justices have expressed concern about remarks made by the prosecuting attorney during final arguments in the sentencing phase. These remarks were in response to statements, not supported by the record, made by the defendant while exercising his right to argue his case to the jury, and the district attorney's remarks alluded to the failure of the defendant to testify.

FOR CLARITY, SEE THE PARTS OF THE RECORD DEALING WITH THESE REMARKS ATTACHED HERETO AS APPENDIX "A."

We do not find any prejudicial error stemming from the prosecutor's remarks. The remarks were prompted by the defendant's own statements which were exculpatory and

self-serving in nature, not under oath and not supported by the record.

Mississippi Constitution, Article 3, Section 26 (1890) guarantees the accused the right to argue his case to the jury. Gray v. State, 351 So.2d 1342 (Miss. 1977). In addition, the accused in a criminal trial has the right not to testify. That right is so basic to the American concept of a fair trial that a prosecutorial comment on an accused's failure to testify is a violation of the self-incrimination clause of the Fifth Amendment. Griffin v. California, 300 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965).

These two rights create a conflict which requires a defendant to make a choice. If he chooses to argue his case to the jury and at the same time invokes the Fifth Amendment, he must confine his remarks to the evidence in the record. The Fifth Amendment privilege against

self-incrimination is a shield, not a sword. A criminal defendant who takes advantage of his right to argue his case to the jury must not be permitted to say all the things he might have testified to had he chosen to call himself as a witness. When he does so, he will be deemed to have waived the right not to have his failure to take the stand commented upon.

There is no doubt that an individual may waive the personal protections and privileges provided by the United States Constitution, Morgan v. United States Fidelity & Guaranty Co., 222 So.2d 820 (Miss. 1969). See also Brewer v. State, 233 So.2d 779 (Miss. 1970) [right of confrontation]; Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed.2d 1461, 146 A.L.R. 357 (1937) [Sixth Amendment]; Zap v. United States, 328 U.S. 624, 66 S.Ct. 1277, 90 L.Ed. 1477 (1946) [Fourth and Fifth Amendments].

This Court has specifically recognized that an accused can waive his immunity from self-incrimination, and that he does so when he takes the stand and testifies on the merits of the case. See Autry v. State, 230 Miss. 421, 92 So.2d 856 (1957). We are of the opinion that he does the same when he goes beyond the record when arguing his case and gives testimony on a material point which is not in the record.

The practical solution to the dilemma presented by the accused who uses his constitutional right to argue his case to the jury to give, what is for all practical purposes, testimony is to treat the unsworn testimonial statements of the accused which were not supported by the record as a partial waiver of the privilege against self-incrimination. It is not a total waiver of the privilege, since the prosecution is

unable to cross-examine the accused at this late stage of the trial. But the prosecution may comment to the jury that the defendant's statements were not given under oath and that he was not subject to cross-examination about them. The constitutional privilege of the criminal defendant appearing pro se is adequately protected if the court gives him a clear and direct warning out of the presence of the jury prior to beginning his argument that such limited comment might follow if he goes outside the record and gives what amounts to unsworn testimony.

The Mississippi Constitution gives the accused the right to be heard by himself or counsel, or both. However, it does not exempt a defendant who argues pro se from following the rules of court procedure. We do note, however, that the trial court should allow him some leeway in arguing his case, each case

necessarily resting on its own facts and circumstances.

But, in those instances where a defendant, arguing pro se, clearly goes beyond the evidence in the record on a material point, as he did in this case, he must accept as a consequence the prosecution's comment on his failure to swear to the testimony. The defendant's remarks in this case cannot be dismissed as a failure to grasp "legal niceties." They are unsworn testimony, and as such, constitute a partial waiver of the constitutional privilege against self-incrimination and the prohibition against a district attorney from commenting on his not taking the stand.

We do not say that every defendant who argues pro se loses the privilege against prosecutorial comment on his failure to testify. Only when the defendant's remarks go

beyond the evidence does he waive this privilege.

The appellant also contends the following statement by the district attorney in his closing argument constituted prejudicial error:

> To come up behind an old man in the twilight years of life and hit him four times, as he told you, with a wrench. We finally found out what it was--with a wrench. That's what he told you when he got up here.

Even though an objection to this statement was sustained, the appellant contends that its effect was not erased from the minds of the jurors. Assuming this is true, we are not convinced the statement was prejudicial. The facts showed that the decedent was struck with a blunt instrument. We see no prejudice resulting from naming the instrument for what it was, be it a wrench or an iron pipe. The fact remains that decedent's death resulted from the blow. The jury was properly

instructed to consider only the evidence in the record, and we cannot agree that any prejudice resulted since the objection to the statement was sustained.

Another problem which deserves comment arose in the sentencing phase. The lower court admitted evidence of an armed robbery conviction of the appellant entered after the December 2, 1974, murder of Weinburger. This conviction was affirmed on appeal in a per curiam opinion. Jones v. State, 340 So.2d 17 (Miss. 1976).

Among the aggravating circumstances available for consideration in capital cases under Mississippi Code Annotated section 99-19-101 (Supp. 1979), subsection (5)(b) is that: "The defendant was previously convicted of another capital offense or of a felony involving the use or threat of violence to the person." (Emphasis added). In employing the

word "previously," the statute designates no time frame. The question arises as to whether the legislature meant previous to the commission of the capital offense or previous to the trial for it.

We conclude the legislature intended to relate the word "previously" to the time of trial, so that a conviction between the time the capital offense was committed and the time of trial for it may be admitted into evidence as an aggravating circumstance. We think this, because a wide leeway is permitted the appellant to offer mitigating circumstances in avoidance of the death sentence, while an extremely limited type of behavior may be offered by the state in seeking capital punishment. In our opinion, the legislature undoubtedly intended a weighing of both at the time of sentencing so the past behavioral patterns likely to affect the defendant's

future behavior might be evaluated by the jury in deciding whether the defendant will live or die. We think there is no more justification for terminating consideration of the defendant's criminal behavior at the time of the offense than there is for terminating consideration of favorable behavior at that time. All go to the question of whether the most severe punishment will serve a legitimate social purpose untainted by vindictiveness.

The aggravating circumstances introduced into evidence and appearing in the jury's verdict are:

> (1) The offense was committed during the commission of robbery.
>
> (2) The offense was especially heinous, atrocious or cruel.
>
> (3) Defendant has been previously convicted of a felony involving the use or threat of violence to the person.

The first was established by the first phase of trial which culminated in a guilty verdict. The second was proved by pictures illustrating the atrociousness of the killing, together with testimony showing the victim to have been old and weak in comparison with appellant. The third was established by the introduction of court records concerning the prior armed robbery conviction.

The defendant introduced no evidence of mitigating circumstances at the sentencing phase. However, there is evidence that the defendant's age was either seventeen or eighteen years at the time of the crime. Also, a mitigating circumstance mandated by Mississippi Code Annotated section 99-19-101(6)(d), relates to the role of the defendant in the crime. In this regard, there was no testimony indicating that this defendant was the one who struck the blows causing death

even though blood was found on his boots. The jury was obviously aware of these circumstances and was instructed to consider any facts concerning the crime or the defendant's background which would reasonably mitigate against imposition of the death penalty. The jury nevertheless found unanimously from the evidence beyond a reasonable doubt that after weighing the mitigating circumstances and the aggravating circumstances, one against the other, the mitigating circumstances did not outweigh the aggravating circumstances, and the defendant should suffer the penalty of death.

Mississippi Code Annotated section 99-19-105 (Supp. 1979), in pertinent part, mandates the following:

* * * *

> (2) The Mississippi Supreme Court shall consider the punishment as well as any errors enumerated by way of appeal.

(3) With regard to the sentence, the court shall determine:

(a) Whether the sentence of death was imposed under the influence of passion, prejudice or any other arbitrary factor;

(b) Whether the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in section 99-19-101; and

(c) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

* * * *

(5) The court shall include in its decision a reference to those similar cases which it took into consideration. In addition to its authority regarding correction of errors, the court, with regard to review of death sentence, shall be authorized to:

(a) Affirm the sentence of death; or

(b) Set the sentence aside and remand the case for modification of the sentence to imprisonment for life.

(6) The sentence review shall be in addition to direct appeal, if

> taken, and the review and appeal shall be consolidated for consideration. The court shall render its decision on legal errors enumerated, the factual substantiation of the verdict, and the validity of the sentence.

In response to subsection (3)(a), the Court is of the opinion that the sentence of death was not imposed under the influence of passion or prejudice.

In response to subsection (3)(b), the Court is of the opinion that the evidence does support the jury's finding of the statutory aggravating circumstances as enumerated in section 99-19-101 and recited in the verdict.

In response to subsection (3)(c), the Court is of the opinion that the sentence of death is not excessive and disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

In complying with subsection (5), we have reviewed the following capital cases in which

we have rendered dispositive decisions affirming death sentences and setting dates for executions: Culberson v. State, No. 50,802, decided November 28, 1979, and not yet reported; Gray v. State, 375 So.2d 994 (Miss. 1979); Jordan v. State, 365 So.2d 1198 (Miss. 1979); Voyles v. State, 362 So.2d 1236 (Miss. 1978); Irving v. State, 361 So.2d 1360 (Miss. 1978); Washington v. State, 361 So.2d 63 (Miss. 1978); and Bell v. State, 360 So.2d 1206 (Miss. 1978).

SYNOPSES OF THE ABOVE CASES

Bell was an armed robbery case where the robbery has been successfully completed and the killing afterward was wanton, useless and utterly unnecessary. Although at trial Bell denied having actually fired the fatal shot, there was competent evidence that showed he was armed and present when the execution-style

killing occurred. The jury found as an aggravating circumstance that Bell had committed the murder and the murder had occurred during the commission of armed robbery and kidnapping.

The following circumstances in mitigation were before the jury:

> (1) On the night of the murder Bell had been taking marijuana and other drugs;
>
> (2) Bell was either seventeen or eighteen years of age;
>
> (3) According to Bell's testimony, he was an accomplice only and had asked another not to kill the victim at one time.

In Voyles, a thirty-year-old defendant killed his girl fried because she refused to put title to her car in his name. He beat her into unconsciousness, ran over her with a car, and threw her body into a creek. Relying essentially on the testimony of defendant's

nephew, an eyewitness who claimed innocence, the jury found him guilty of capital murder and imposed a death sentence. Aggravating circumstances included the cruelty and atrocity of the killing, that the offense was committed for pecuniary gain, and that it was committed during the course of an attempt to commit robbery. There was no mitigating circumstances submitted to the jury.

In Culberson, the same three aggravating circumstances were present as are present in this case. A mitigating circumstance was that the death sentence rested solely on the testimony of the admitted accomplice, who had plea-bargained for a lesser sentence. In affirming the sentence of death, we implicitly held that the testimony of an admitted accomplice in a capital murder case sufficient to sustain a conviction in the guilt phase of

the trial, is sufficient to sustain the death penalty in the sentencing phase.

The proof in this case sufficiently demonstrates that the defendant was an active and willing participant in a robbery in furtherance of which a death resulted. Although there was no direct testimony that Jones struck the fatal blow, the blood on his boots, coupled with the testimony of several witnesses who placed Jones near the scene of the crime, is strong evidence that he was at least present when the fatal beating took place. The doubt concerning Jones' precise role in the homicide does not upset the jury's sentence of death under these circumstances.

Compared to the other capital cases in which we have affirmed the death sentence, this killing was equally as wanton, cruel and senseless as the others. The defendant was actively engaged in a robbery during the course

of which the victim, a merchant over seventy years of age, was brutally murdered by blows to the head which crushed his skull.

The present case was heard by the full Court, sitting en banc, and carefully reviewed in the manner set forth in Bell, supra, and that prescribed by Mississippi Code Annotated section 99-19-105(3) (Supp. 1978).

We find that: the sentence of death was not imposed in this case under the influence of passion, prejudice or any other arbitrary factor; that the evidence supports the jury's finding of statutory aggravating circumstances; and, having considered both the crime and the defendant, we find that the sentence of death in this case is not excessive or disproportionate to similar cases in which such sentence has been imposed. The decision in the present case is consistent with conclusions

reached in other cases before this Court in which the death penalty has been imposed.

Jones' conviction of capital murder and the sentence of death imposed upon him will be affirmed.

AFFIRMED AND WEDNESDAY, MARCH 12, 1980 IS SET AS THE DATE OF EXECUTION OF THE DEATH SENTENCE.

ALL JUSTICES CONCUR IN THE GUILT-DETERMINING PHASE: WALKER, J., ROBERTSON, P.J., SUGG, LEE AND BOWLING JJ., CONCUR IN THE SENTENCE-DETERMINING PHASE; PATTERSON, C.J., SMITH, P.J., BROOM AND COFER, JJ., DISSENT.

APPENDIX "A"

LARRY JONES' PRO SE ARGUMENT TO JURY
DURING SENTENCING PHASE OF THE
BIFURCATED TRIAL

* * *

THE JURY WAS THEREUPON RETURNED TO THE COURTROOM AND THE COURT HAVING FIRST INSTRUCTED THE JURY, MR. THOMAS PRESENTED OPENING ARGUMENT TO THE JURY ON BEHALF OF THE STATE OF MISSISSIPPI, AT THE CONCLUSION OF WHICH, THE DEFENDANT PROCEEDED WITH FINAL ARGUMENT TO THE JURY, DURING THE COURSE OF WHICH THE FOLLOWING OBJECTION WAS MADE:

THE DEFENDANT: Ladies and gentlemen, my name is Larry Jones and since I see that y'all is confused about what happened and you know, none of y'all know the real facts, which I don't either, and there was more than three peoples involved - there was four involved in the --

BY MR. NECAISE: -- if the Court please, now, we object to that.

BY THE COURT: On what grounds, counsel?

BY MR. NECAISE: On the grounds that he is testifying, if the Court please, and there's no way we can cross examine him on that. He's

saying there were four people involved. There's no testimony to that, Judge, and no way we can cross examine him on that. Now, he can make a plea to the jury but not something that is not in the record.

BY THE COURT: Well, as to the limited statement, I am going to overrule the objection.

* * *

THE DEFENDANT CONTINUED WITH FINAL ARGUMENT TO THE JURY WHEN ANOTHER OBJECTION WAS MADE BY MR. NECAISE:

THE DEFENDANT: We got uptown. He knowed about it. I'm the only one didn't have no idea of what was happening because they had planned way before I ever thought - you know, they planned it when they got short of money --

BY MR. NECAISE: -- if the Court please, we are going to object to this.

BY THE COURT: On what grounds?

BY MR. NECAISE: On the same grounds - this is not testimony - this is not in the record.

BY THE COURT: Well, that's what he's arguing, counsel. He's entitled to make argument and draw inferences from the testimony in the record and I --

BY MR. NECAISE: -- Judge, it's not in the record.

BY THE COURT: -- don't know that he's exceeded that yet.

* * *

THE DEFENDANT PROCEEDED WITH FINAL ARGUMENT TO THE JURY AND ANOTHER OBJECTION WAS MADE BY MR. NECAISE:

THE DEFENDANT: Just as I was coming back, I seen Roy coming out with this suitcase and Willie running the opposite way - I don't know which way it was - I think it was back this way, which is --

BY MR. NECAISE: -- if the Court please, now, that is testifying as to what he saw coming out. That's not drawing any inference. That's testifying and there's no way to contradict that and it's not fair, Judge, if he doesn't taken the stand and let the State cross examine him on this but to stand up here and be able to do something that the State does not have a right to cross examine him on is not proper and that is certainly outside of the record, Judge. There's nothing in the record that Roy was the one that came outside and that Roy was the one that had on the boots. There's no testimony to that. It's uncontradicted until he got up here to make what he's calling a final argument and what he's doing is testifying. The State didn't have a right to call him, Judge. We couldn't put him on the stand.

BY THE COURT: The same rule applies, counsel, to the Defendant at this time as far as the statement he makes here is not testimony and is not evidence. It's merely argument and the jury should consider only the evidence in the course of their deliberation.

BY MR. THOMAS: Judge, we are restricted to arguing based upon the evidence. He's putting testimony or trying to put it in a backdoor approach before a jury.

BY MR. MORRIS: Your Honor, I am going to take issue to that statement and ask that the jury disregard that remark.

BY THE COURT: Sustained, at least to the last remark about a backdoor approach.

* * *

THE DEFENDANT CONTINUED WITH FINAL ARGUMENT TO THE JURY WHEN ANOTHER OBJECTION WAS MADE:

THE DEFENDANT: During that time, when all this was happening, I was around eighteen and I don't know where or what they --

BY MR. NECAISE: -- if the Court please, now, there is no testimony to that. Now, this is - now, Judge, there is no testimony to that.

BY MR. MORRIS: There is testimony to his age, Your Honor.

BY MR. NECAISE: Judge, there is no --

BY MR. MORRIS: -- from J. D. Reddix. I challenge the record on that.

BY THE COURT: What did Reddix Testify?

BY MR. MORRIS: J. D. Reddix testified that he was twenty at the time of the crime and he is now twenty-three and that the Catfish - his words exactly: Catfish was eighteen years old.

BY THE COURT: Objection overruled.

* * *

FINAL ARGUMENT WAS CONCLUDED BY THE DEFENDANT IN HIS OWN BEHALF AND MR. MORRIS PROCEEDED WITH FINAL ARGUMENT TO THE JURY ON BEHALF OF THE DEFENDANT.

IN THE SUPREME COURT OF MISSISSIPPI

NO. 50,944

LARRY JONES

V.

STATE OF MISSISSIPPI

PATTERSON, CHIEF JUSTICE, DISSENTING:

I concur with the majority in the procedure established for pro se arguments on the sentencing phase of a capital case, but would apply it prospectively as was done in Jackson v. State, 337 So.2d 1242 (Miss. 1976). [1]

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[1] We have discussed the practicality of remanding this case to the trial court for the purpose of determining sentence only, but we are of the opinion that justice demands that the persons convicted and sentenced to death prior to our holding today should have the benefit of all the guidelines outlined herein. (337 So.2d at 1257)

I dissent from the imposition of the death sentence, because the appellant was only seventeen years of age at the time of the homicide and appears to have a borderline mental capacity. While it is true that neither his age or mental capacity was formally introduced into evidence on the sentencing phase, I nevertheless think we are compelled to consider these items on review because such were included with the report prepared by the trial judge as commanded by Mississippi Code Annotated section 99-19-195 (Supp. 1979), and both age and mental capacity are specified in Section 99-19-101(6) concerning mitigating circumstances.

I have no desire to quibble regarding the precise reaction of the jury to the prosecutor's statement, "To come up behind an old man in the twilight years of life and hit him four time, as he told you, with a wrench.

We finally found out what it was-- with a wrench. That's what he told you when he got up here." I think it had the likelihood of leading the jury into the belief that the appellant struck the blows when there is no evidence in this record establishing that fact. Section 99-19-105(2)(a) mandates our consideration of punishment. Subsection (3) directs our attention to determining "whether the sentence of death was imposed under the influence of passion, prejudice or any other arbitrary factor." I cannot state categorically whether the quoted words did or did not prejudice the jury, but I do think they had that propensity.

I would remand for another jury to determine the punishment, giving consideration to the defendant's age and mental capacity. This would also afford the opportunity for both the appellant and the state to give application

to the new rules concerning pro se argument if this prerogative is again indulged by the appellant.

SMITH, P.J., BROOM AND COFER, JJ., JOIN IN THIS DISSENT.